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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

UNISYS CORPORATION, *et al.*,

Petitioners,

v.

JOHN P. MEINHARDT, for Himself and All Others Similarly Situated, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LAURENCE Z. SHIEKMAN
Counsel of Record
BRIAN T. ORTELERE
PEPPER, HAMILTON
& SCHEETZ
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103-2799
(215) 981-4000

JOSEPH A. TEKLITS
UNISYS CORPORATION
P.O. Box 500 C2NW14
Blue Bell, PA 19424-0001

Attorneys for Petitioners

PACKARD PRESS® / APPELLATE DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

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QUESTIONS PRESENTED

An employer acting as a fiduciary purchased investments for an ERISA 401(k) savings plan rated AAA by Standard & Poor's and A+ by A.M. Best, but the investments did not perform as anticipated at the time of their initial selection.

The questions presented are these:

1. Under ERISA, are a fiduciary's investment decisions for such a plan properly subject to judicial review only for an abuse of discretion, or did the court of appeals erroneously employ a strict scrutiny standard?

2. Is a fiduciary required to republish to plan participants information already in the public domain, in order to satisfy ERISA's disclosure requirements?

3. Should ERISA generally be construed to require the most conservative investment decisions by fiduciaries thereby minimizing the expected return to plan participants, while likely causing an outflow of funds from the stock market and leading to higher interest rates?

LIST OF PARTIES AND RULE 29.6 LIST

The petitioners are Unisys Corporation; The Administrative Committee of the Unisys Savings Plan; the Investment Committee of the Unisys Savings Plan; Jack A. Blaine; John J. Laughlin; Kenneth L. Miller; David A. White; Stefan Riesenfeld; Michael R. Losey; Curtis A. Hessler; Edwin P. Gilbert; Thomas Penhale; Richard H. Bierly; Leon J. Level; Jack A. Blaine and George T. Robson Petitioners shall be collectively referred to as "Unisys."

The respondents are Richard Andujar, John H. Burgess, Jr., John J. Cieslicki, Richard Colby, James M. Collins, Alfred Contarino, Angel DiPietro, Engineers Union Local 444 of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, A.F.L.-C.I.O., Joseph Fiore, James Gangale, Kenneth Goers, Carolyn A. Gohlike, Ronald Grippo, Michael Heck, Parker Kean, Nick Klemenz, Joseph Lau, Edward Lawler, Local 3, International Brotherhood of Electrical Workers, A.F.L.-C.I.O., Local 165 of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, A.F.L.-C.I.O., Local 445 of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, A.F.L.-C.I.O., Local 450 of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, A.F.L.-C.I.O., Local 470 of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, A.F.L.-C.I.O., John Marcucci, Richard Mastrodomenico, Joseph McCarthy, Bernard McDevitt, James McLaughlin, John P. Meinhardt, Clarence Muller, Donald Rader, Richard Silver, Farouk M. Sos, Nadia F. Sos, Dennis C. Stanga, Peter Szczybek, William Torkildson, Gary Vala, Charles Wahler, and Henry Zylla. The individual plaintiffs represent a certified class of participants in the savings plans of the Unisys Corporation.

Unisys Corporation has no parent. Its subsidiaries, other than wholly-owned subsidiaries, are Nihon Unisys Ltd. and Oki Unisys Kaisha, Ltd.

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OPINIONS BELOW

The opinion of the court of appeals reversing the district court's grant of summary judgment to petitioner Unisys on the issues raised in this petition is reported at 74 F.3d 420 (3d Cir. 1996), and is reproduced in the appendix attached hereto, "Pet. App." at 1a-53a. The district court's opinion, granting Unisys summary judgment on those same issues, is reported at 1995 WL 29048 (E.D. Pa. Jan. 26, 1995), and is reproduced in the appendix, Pet. App. at 60a-69a. The court of appeals' order denying Unisys' petition for rehearing is reported at 74 F.3d 420 (3d Cir. 1996), and is reproduced in the appendix, Pet. App. at 70a.

JURISDICTION

The judgment of the court of appeals was filed on January 4, 1996 (Pet. App. at 54a-59a), and a timely-filed petition for rehearing was denied by order dated February 6, 1996 (Pet. App. at 70a). This petition is being filed under Supreme Court Rule 13. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254(1).

STATUTES INVOLVED

The pertinent statutory provisions are sections 404(a), 404(c) and 409 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. §§ 1001-1461, as amended, and are set forth in the appendix hereto (Pet. App. at 71a-72a).

STATEMENT OF THE CASE

Petitioners are the fiduciaries of the Unisys Savings Plan, the Unisys Retirement Investment Plan, and the Unisys Retirement Investment Plan II (together the "Plan").[1] The Plan is a participant-directed defined contribution plan under ERISA sections 3(34) and 404(c), 29 U.S.C.A. §§ 1002(34), 1104(c). Because of the preferential tax treatment given participant contributions to their individual accounts under Internal Revenue Code section 401(k), such retirement plans are commonly referred to as "401(k) plans." These plans must be distinguished from defined benefit plans where participants are typically promised, upon retirement, a benefit in the form of a fixed percentage of their pre-retirement salary. *See* 29 U.S.C.A. § 1002(35). In a defined contribution plan (such as the Unisys Savings Plan), "employees are not promised any particular level of benefits; instead, they are promised only that they will receive the balances in their individual accounts." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 637 n.1 (1990).

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1. The three plans were "identical" and, as such, will be together described as a singular plan. *In re Unisys Savings Plan Litig.*, 74 F.3d 420, 426-27 (3d Cir. 1996)("*Unisys*")(Pet. App. at 11a).

The employee-investors, participants in defined contribution plans, not the fiduciaries, bear the risk of loss. Two commentators described the risk allocation in these plans:

> Defined contribution and defined benefit plans allocate investment risk oppositely. Under a defined contribution plan, the employee bears the burden of disappointing investment results and pockets the gains from good results. Under a defined benefit plan, the employer bears the investment risk. Since the employer has promised to provide benefits at a certain level, the employer remains liable to pay the benefits even if the fund turns up short.

Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. Chi. L. Rev. 1105, 1112-13 (1988).[2]

To facilitate the management of participants' investments, the Unisys Plan offered them the opportunity to direct their money to any of six varied investment options or "funds." Further, participants could, subject to certain restrictions, once each month transfer their money among these six funds. These funds had varying levels of risk and return and included the Diversified Fund, the Indexed Equity Fund, the Active Equity Fund, the Unisys Common Stock Fund, the Short Term Investment Fund, and the Insurance Contract Fund. The characteristics of the funds were described to participants in Plan prospectuses and summary plan descriptions.

In a six-month period, beginning in June 1987 and through January 1988, Unisys purchased three five-year "guaranteed investment contracts" as additional investments for the Sperry Fixed Income Fund and the Unisys Insurance Contract Fund.[3] Unisys bought GICs issued by the Executive Life

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2. *See also Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 163 (7th Cir. 1988)(To impose upon plan sponsor investment risk in defined contribution plan "is an inequity of the heads I win, tails you lose variety that neither the ERISA statute nor the ... plan documents perpetrate.").

3. A guaranteed investment contract or "GIC" is a contract, issued by an insurance company, "under which the issuer is obligated to repay the principal deposit at a designated future date and to pay interest at a specified rate over the duration of the contract." *Unisys*, 74 F.3d at 426 (Pet. App.

Insurance Company of California ("Executive Life"), then rated AAA and A+ by two nationally-recognized insurance ratings services, Standard & Poor's and A.M. Best, respectively. *Unisys,* 74 F.3d at 427 (Pet. App. at 12a). Executive Life was also licensed in all of the states where it transacted business. Over three years after the last Executive Life investment was made, and notwithstanding the fact that Executive Life had made all of the interim payments to the Plan, on April 11, 1991, California regulators imposed a conservatorship on Executive Life, the insurance equivalent of a Chapter 11 corporate reorganization. *Unisys,* 74 F.3d at 431 (Pet. App. at 19a).

Immediately thereafter, plaintiffs in these proceedings filed twelve ERISA class action complaints in the district courts of Minnesota and Pennsylvania, alleging that their Executive Life investments were a total loss. In fact, subsequent events have proven these predictions of total loss inaccurate. Executive Life was rehabilitated by the California Insurance Commissioner (subject to the supervision of the California courts) and, as such, the employee-investors have already recovered eighty-two percent of the amounts "frozen" at the time of the conservatorship. Moreover, it is not disputed that, upon the final liquidation of Executive Life's remaining assets, these employee-investors will have recouped approximately eight-five percent of their 1991 Executive Life investments.[4]

NOTES *(Continued)*

at 9a). The Unisys Savings Plan emerged from the merger of the Sperry Retirement Program — Part B and the Burroughs Employees Savings Thrift Plan. *Id.* (Pet. App. at 9a). Following the merger of the two plans, the Sperry fund ceased to accept new contributions, but proceeds from contracts in that fund were reinvested in the Unisys Insurance Contract Fund. *Id.* (Pet. App. at 10a).

4. Participants may well recover all of their Executive Life investments from the various state "guaranty" associations, obligated to reimburse any participant losses. *E.g., Unisys Corp. v. Pennsylvania Life and Health Ins. Guar. Assoc.,* 667 A.2d 1199 (Pa. Commw. Ct. 1995)(Pennsylvania resident plan participants entitled to guaranty coverage). Similar litigation is ongoing in a number of other state courts where participants also resided.

Following consolidation in the Eastern District of Pennsylvania, the parties engaged in discovery and motion practice, after which the district court granted Unisys' motion for summary judgment holding that the fiduciaries' selection of Executive Life GICs was based upon "solid, respectable and typical grounds." 1995 WL 29048, at * 4 (Pet. App. at 65a). Moreover, because the participants had adequate information from which to make informed choices regarding their investments, the district court ruled that, pursuant to ERISA section 404(c), 29 U.S.C.A. § 1104(c), the fiduciaries could not be held liable for the alleged losses. 1995 WL 29048, at * 3 (Pet. App. at 64a).

The Third Circuit reversed the district court's ruling and remanded the matter for trial. As to the initial investment, that court held that the prudence of Unisys' decision to purchase the Executive Life GICs could not be determined without a trial. *Unisys,* 74 F.3d at 434-37 (Pet. App. at 25a-32a). More specifically, the court held that the prudence of the fiduciaries' primary reliance on the insurance ratings services, in selecting the Executive Life GICs, could not be resolved on summary judgment. *Unisys,* 74 F.3d at 435-36 (Pet. App. at 26a-30a).

Moreover, the Third Circuit held that Unisys may rely on the exemption in ERISA section 404(c), 29 U.S.C.A. § 1104(c), in defense of the participants' claims. Section 404(c) recognizes that participants in such plans enjoy the right to direct their investments as they see fit and, further, excuses fiduciaries from losses associated with participant investment instructions. The Third Circuit ruled further that Unisys' disclosures to participants on the status of their investments must be evaluated independent of information then available in the public domain. *Unisys,* 74 F.3d at 443 (Pet. App. at 42a-43a). To determine whether Unisys had supplied participants adequate information regarding their investments, the court of appeals rejected Unisys' argument that the participants are charged with knowledge of the publicly-available information on their investments. In other words, and equally troubling for plan administrators, the Third Circuit's ruling requires defined contribution plan fiduciaries somehow to collect and to assess

and then to re-publish public information on each of the many hundreds of investments that comprise a typical 401(k) plan portfolio.

REASONS FOR GRANTING THE WRIT

A.

The court of appeals held that ERISA permits federal courts to second guess fiduciary investment decisions employing a strict scrutiny standard. As such, the Third Circuit's ruling on the threshold investment decision squarely raises the issue left open in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), *i.e.*, whether fiduciary decisions, *e.g.*, investment choices, should be scrutinized under the "arbitrary and capricious standard." Because this issue appears to have been finally determined by this Court's recent decision in *Varity Corp. v. Howe*, No. 94-1471, 1996 U.S. LEXIS 1954 (U.S. March 19, 1996), decided after the Third Circuit's decision in *Unisys*, this Court should grant this petition and summarily reverse the court of appeals' judgment on the authority of its own intervening decision in *Varity*. If *Varity* does not supply the controlling rule of law, a split in applicable courts of appeals authority nonetheless requires this Court's review.

The *Unisys* opinion also directly conflicts with then Judge Scalia's opinion in *Fink v. National Savings and Trust Co.*, 772 F.2d 951, 961-65 (D.C. Cir. 1985)(Scalia, J., concurring in part and dissenting in part), which established a deferential standard of review of fiduciaries' investment choices. *Fink* and its courts of appeals progeny hold that ERISA's causation requirements compel the dismissal of fiduciary breach claims where, as here, there is indisputable objective evidence of the prudence of the fiduciary's actions.

1.

The Plan documents here granted the Unisys fiduciaries substantial discretion in making the initial investment choices,[5]

5. The Plan prospectus explained to participants the discretion enjoyed by the fiduciaries:

and ERISA recognizes that discretion is the hallmark of fiduciary activity. *See* 29 U.S.C.A. § 1002(21)(A)(i). The lower court rejected all pretense of fiduciary discretion and ordered the district court to apply a strict scrutiny standard to evaluate the fiduciary's conduct. *Unisys*, 74 F.3d at 433-37 (Pet. App. at 43a-51a). The lower court's ruling squarely presents the issue whether the federal courts should second guess fiduciary conduct rather than apply this Court's deferential standard of review mandated by *Varity*.

In *Firestone*, this Court instructed the lower courts to apply a deferential standard of review to assess denials of ERISA benefits:[6]

> Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers. *See* Restatement (Second) of Trusts § 187 (1959) ("[w]here discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion").

The Administrative Committee has the exclusive right to interpret the Plan and to decide matters arising under the Plan except for those matters which are designated by the Plan as the responsibility of the Investment Committee. The Investment Committee has the exclusive right to direct the trustee of the Plan (the "Trustee") with respect to investment of the assets of the Plan, to remove and appoint successor Trustees of the Plan, to establish or terminate investment funds, and to select and terminate investment managers. The Trustee is responsible for the supervision or investment of Plan assets, subject to the direction or approval of the Investment Committee or investment managers and subject to the terms of the Plan.

6. This Court's opinion in *Firestone* was limited to the standard governing judicial review of benefits claims under ERISA section 502(a)(1)(B):

> The discussion which follows is limited to the appropriate standard of review in § 1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations. We express no view as to the appropriate standard of review for actions under other remedial provisions of ERISA.

Firestone, 489 U.S. at 108.

Firestone, 489 U.S. at 111.[7]

Consistent with *Firestone*, and recognizing the discretion enjoyed by the fiduciaries under the Plan, Unisys' actions should be reviewed under the "arbitrary and capricious" standard.

This Court's recent *Varity* opinion holds that the deferential standard applied to ERISA benefits claims should also be applied to the resolution of fiduciary breach claims. Responding to the argument that to allow individual remedies for fiduciary breaches under 29 U.S.C.A. § 1132(a)(3) would yield more fiduciary breach claims, with a more exacting standard of review, this Court held that the abuse of discretion standard also applies to fiduciary breach claims:

> [C]haracterizing a denial of benefits as a breach of fiduciary duty does not necessarily change the standard a court would apply when reviewing the administrator's decision to deny benefits. *After all, Firestone, which authorized deferential court review when the plan itself gives the administrator discretionary authority, based its decision upon the same common-law trust doctrines that govern standards of fiduciary conduct.*

Varity, 1996 U.S. LEXIS 1954, at * 45 (emphasis added). On the authority of *Varity* alone, read in light of the discretion granted to the fiduciaries (*see supra* at 6-7 n. 5), this Court should reverse the *Unisys* opinion and require application of a deferential standard of review.

Even if *Varity* is not deemed controlling, conflict and confusion among the courts of appeals on the governing standard necessitates this Court's review. In essence, the *Unisys* opinion holds that the fiduciaries' investment decision in Executive

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7. The commentary to section 187 of the *Restatement (Second) of Trusts*, the section relied on in *Firestone*, extends this discretionary authority to investment decisions. *See Restatement (Second) of Trusts* § 187, comment c (1959)(The discretionary authority "is applicable not only to powers to lease, sell or mortgage the trust property *or to invest trust funds*, but also to powers to allocate the beneficial interest among various beneficiaries, to determine the amount necessary for a beneficiary's support, or to terminate the trust.")(emphasis added).

Life should be scrutinized consistent with general prudence standards. *Unisys*, 74 F.3d at 435-36 (Pet. App. at 28a-29a). The lower court failed to address, however, *Unisys*' argument that, after *Firestone*, a deferential standard of review is appropriate. The *Unisys* ruling thus essentially requires the application of a "strict scrutiny" standard to evaluate the fiduciaries' actions.

The Third Circuit's failure to adopt a deferential standard of review in these circumstances conflicts with the First Circuit's opinion in *Mahoney v. Board of Trustees,* 973 F.2d 968, 971-73 (1st Cir. 1992), rejecting a "strict standard of review" because " '[w]here discretion is conferred upon the trustee with respect to the exercise of a power . . . the trustee's 'exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.' "[8]

Indeed, another panel of the Third Circuit, ruling in the ESOP context, followed *Firestone*, and held that the arbitrary and capricious standard should apply to fiduciary breach litigation:

> [W]e believe that after *Firestone*, trust law should guide the standard of review over claims, such as those here, not only under section 1132(a)(1)(B) but also over claims filed pursuant to 29 U.S.C.A. § 1132(a)(2) based on violations of the fiduciary duties set forth in section 1104(a). After all, section 1104(a) also abounds with the language of trust law, and the Supreme Court previously has noted that "Congress invoked the common law of trusts to define the general scope of [fiduciaries'] authority and responsibility."

Moench v. Robertson, 62 F.3d 553, 565 (3d Cir. 1995)(quoting *Central States, Southeast and Southwest Areas Pension Fund v. Central Transp., Inc.,* 472 U.S. 559, 570 (1985)), *cert. denied,* 116 S.Ct. 917 (1996).[9]

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8. Quoting *Restatement (Second) of Trusts* § 186.

9. Unisys asked the Third Circuit to consider the impact of *Moench* on this dispute, pursuant to Fed. R. App. P. 28(j) and in its rehearing petition; nevertheless, that court did not do so.

The Second Circuit has, on the other hand, limited *Firestone* to the judicial review of benefits claims under ERISA section 502(a)(1)(B):

> We reject the argument that *Firestone*'s arbitrary and capricious standard applies to [defendants'] conduct in this matter. *Firestone* involved the denial of benefits, and the Court stated that if the terms of the plan accorded the administrator discretion in such matters, the decision should be upheld unless arbitrary and capricious. *However, we decline to apply the arbitrary and capricious standard to the fiduciary conduct at issue because this case does not involve a simple denial of benefits, over which the plan administrators have discretion.*

John Blair Communications, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan, 26 F.3d 360, 369 (2d Cir. 1994) (emphasis added).

Assuming *Varity* does not control, this Court should grant this petition to determine the appropriate standard of review applicable to fiduciary breach claims under ERISA, and to resolve this conflict among the First, Second and Third Circuits.

2.

The *Unisys* opinion also conflicts with those courts of appeals decisions holding that ERISA's causation requirement, section 409 of ERISA, 29 U.S.C.A. § 1009, similarly compels application of a deferential standard of review to challenges to fiduciary investment decisions. This approach, dubbed the "hypothetical prudent fiduciary" analysis, recognizes the deference owing fiduciaries under ERISA. After describing the reasonable prudent fiduciary standard applied to investment choices, then Judge Scalia, concurring and dissenting in *Fink,* observed that a second step is needed to resolve the fiduciary breach claim. ERISA's causation requirement, contained in section 409, compels a further inquiry into whether there is objective evidence of prudence. In such circumstances, a fiduciary cannot be held liable in damages:

> I know of no case in which a trustee who has happened — through prayer, astrology or just blind luck — to make (or hold) objectively prudent investments (*e.g.*, an investment in a highly regarded "blue chip" stock) has been held liable for losses from those investments because of his failure to investigate and evaluate beforehand.

Fink, 772 F.2d at 962. The Eighth Circuit, building on Judge Scalia's opinion in *Fink*, explained further:

> Even if a trustee failed to conduct an investigation before making a decision, he is insulated from liability if a hypothetical prudent fiduciary would have made the same decision anyway.

Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 919 (8th Cir. 1994).[10] Both *Fink* and *Roth* directly conflict with *Unisys* on the judicial standard governing a fiduciary's investment decision and, as such, this Court's review of *Unisys* is needed. As discussed immediately below, there was an abundance of objective evidence suggesting the prudence of *Unisys*' investment decision.

3.

The standard of review applied to fiduciary breach claims will affect not only whether such litigation is brought, but the outcome of any such litigation. As Unisys explained to the court below, both the Department of Labor and the Pension Benefit Guaranty Corporation ("PBGC"), during the relevant time period, established a flexible standard for the purchase of insurance annuities upon the termination of a defined benefit pension plan, pursuant to ERISA section 4041(b)(3)(A)(i), 29

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10. *See also Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995)("[A] fiduciary's failure to investigate an investment decision *alone* is not sufficient to show that the decision was not reasonable.")(emphasis in original); Note, *Must We Teach Abstinence? Pensions' Relationship Investments and the Lessons of Fiduciary Duty*, 94 Colum. L. Rev. 2222, 2248 n.118 (1994)("Judge Scalia (as he was then) argued in dissent [in *Fink*] that a breach of the duty to investigate had meaning only to the extent it caused a losing bet on a substantively poor investment. . . . Scalia's seems the better position.").

U.S.C.A. § 1341(b)(3)(A)(i). In that context, to satisfy an individual's pension benefit from one insurance company for his lifetime, both of these regulatory agencies required only that the insurance company selected be state licensed. *See* 29 C.F.R. §§ 2617.2, 2617.4, 2617.22(d)(8)(PBGC standard)(1995); 29 C.F.R. § 2510.3-3(d)(2)(ii)(A)(1)(DOL standard)(1995). These standards apply notwithstanding the fact that the fiduciaries typically face a conflict of interest in such circumstances, *i.e.,* they stand to recoup any available pension plan surplus after purchase of the annuity. *E.g., Riley v. Murdock,* 890 F. Supp. 444, 458-59 (E.D.N.C. 1995)(purchase of Executive Life annuities ancillary to termination of defined benefit pension plan not a breach of fiduciary obligation, even if selection of annuity maximized reversion of plan surplus).

Aside from the fact that Executive Life was licensed by the State of California (and all states where it transacted business), it had, at the time of *Unisys*' purchase, an AAA rating from Standard & Poor's and an A+ rating from A.M. Best. *Unisys*, 74 F.3d at 427 (Pet. App. at 12a). In fact, state regulation of the insurance industry typically requires the "guaranty" of these benefits, by state insurance guaranty associations. *E.g., Unisys Corp. v. Pennsylvania Life and Health Ins. Guar. Assoc.,* 667 A.2d 1199 (Pa. Commw. Ct. 1995). Moreover, it is undisputed that no conflict of interest arose with the purchase of the Executive Life GICs, and Executive Life was but one of many insurers in the Plan's portfolio.

Proper application of a deferential standard of review would likely have absolved Unisys from plaintiffs' claim to damages, without the need for a trial. This Court should grant *Unisys*' petition to resolve this important issue to the administration of defined contribution pension plans, and of equal importance to the resolution generally of fiduciary breach claims under ERISA.

B.

The Third Circuit's opinion requires defined contribution plan fiduciaries to re-transmit publicly-available information on the status of participants' investments. This aspect of

Unisys runs counter to the Department of Labor's explicit regulatory command excusing fiduciaries from such an obligation. Indeed, by tying this obligation to ERISA section 404(a), the Third Circuit has unwittingly supplanted the Department's detailed regulatory scheme for such plans. *See* 57 Fed. Reg. 46906-937 (1992). In effect, the *Unisys* opinion requires defined contribution plan fiduciaries to run a "clipping service" for participants, collating and re-broadcasting the multitude of public information on plan investments, a judicially-cobbled duty drawn from ERISA's general fiduciary obligation to act prudently.[11]

In reaching this conclusion, the court of appeals went beyond section 404(c), to the general prudence obligations of section 404(a), to define the fiduciary's disclosure obligations in administering plans governed by 404(c). Building upon a line of unrelated Third Circuit fiduciary disclosure cases construing the prudence standard of section 404(a),[12] the court of appeals reached the alarming conclusion that *Unisys* was obligated to broadcast to participants public information on the status of their investments, limited only by the materiality standard apparently borrowed from federal securities law:

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11. Unisys collected for the Third Circuit a sample of the public materials then available on Executive Life, from such sources as the *Wall Street Journal, Forbes, The New York Times, The Los Angeles Times, The San Francisco Chronicle,* the United Press International and the Associated Press. According to the court of appeals, "[d]uring this time, Executive Life's condition was widely reported in the financial press." *Unisys*, 74 F.3d at 431 (Pet. App. at 19a).

12. The opinions from which the Third Circuit's new rule was derived do not address the circumstances unique to the administration of defined contribution pension plans. *Unisys*, 74 F.3d at 440-41 (Pet. App. at 38a). *See Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 57 F.3d 1255 (3d Cir. 1995)(modifications to retirement medical plan), *cert. denied*, 116 S.Ct. 1316 (1996); *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226 (3d Cir. 1994)(claims for life insurance and accidental death and dismemberment benefits); *Bixler v. Central PA Teamsters Health and Welfare Plan*, 12 F.3d 1292 (3d Cir. 1993)(participant inquiries regarding medical benefits); *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130 (3d Cir.)(early retirement "window" afforded defined benefit pension plan participants), *cert. denied*, 114 S.Ct. 622 (1993).

> In our view, while Unisys was not obligated to share with participants everything it knew about GICS and Executive Life, it was obligated to impart to participants material information of which it had knowledge that was sufficient to apprise the average plan participant of the risks associated with investing in the Fixed Income and Insurance Contract Funds in view of the purchases of the Executive Life GICs and the financial condition Executive Life presented in 1990. *Moreover, in this regard, we do not, as Unisys urges, distinguish between "public" and "non-public" information nor do we limit Unisys' duty to disclose to the latter.*

Unisys, 74 F.3d at 443 (Pet. App. at 43a) (emphasis added).

The lower court's opinion is directly at odds with the Department of Labor's 404(c) regulations. To keep defined contribution plan administrative costs down, the regulations explicitly relieve fiduciaries of the disclosure obligation announced in *Unisys*. Under the regulations, a participant's exercise of control under ERISA section 404(c) will not be deemed "independent" if:

> (ii) *A plan fiduciary has concealed material non-public facts regarding the investment from the participant or beneficiary,* unless the disclosure of such information by the plan fiduciary to the participant or beneficiary would violate any provision of federal law or any provision of state law which is not preempted by [ERISA] . . . .

29 C.F.R. § 2550.404c-1(c)(2)(ii)(1995)(emphasis added). Incredibly, and notwithstanding this regulatory guidance, the lower court's ruling requires fiduciaries to locate, collect, interpret, and disseminate publicly-available information on the

status of plan investments.[13] The governing regulation requires only that fiduciaries not "conceal" information already in their possession.

Admittedly, the 404(c) regulation, by its terms, does not apply to this case. 29 C.F.R. § 2550.404c- 1(g)(1)(1995)("[T]his section is effective with respect to transactions occurring on or after the first day of the second plan year beginning on or after October 13, 1992."). Nevertheless, the regulatory limitation requiring the disclosure only of "material non-public information" is of no consequence in the wake of the *Unisys* opinion. By grounding the disclosure obligation in section 404(a), as opposed to 404(c), the *Unisys* holding applies equally to fiduciary conduct arising before and after the effective date of the regulations. In other words, fiduciaries must somehow now harmonize the Third Circuit's opinion, grounded in section 404(a), and the Department of Labor's section 404(c) regulation. Because the two approaches are irreconcilable, the fiduciaries must either adhere to the *Unisys* ruling (at tremendous cost), or terminate the plan.

Moreover, these judicially-constructed disclosure requirements exceed those required under the federal securities laws. It is a basic principle of corporate law that a corporation's directors owe fiduciary duties to the corporation's stockhold-

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13. In so holding, the *Unisys* opinion ignores this Court's repeated admonition that ERISA cannot be construed to create new rights and obligations, absent an explicit congressional directive. *E.g., Mertens v. Hewitt Assoc.*, 508 U.S. 248, 261 (1993)("[V]ague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration.")(emphasis in original); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985)("This 'blue pencil' method of statutory interpretation — omitting all words not part of the clauses deemed pertinent to the task at hand — impermissibly ignores the relevant context in which statutory language subsists."). Prior to *Unisys*, all assumed that a 404(c) plan fiduciary need not look beyond that section to discern its responsibilities in administering such a plan. *E.g.*, ABA Section of Labor and Employment Law, *Employee Benefits Law* 293 (Steven J. Sacher, *et al.*, eds. 1991)("A significant exception to the rules governing fiduciaries applies to individual account plans that permit participants or beneficiaries to exercise control over assets in their account.").

ers. *Pepper v. Litton*, 308 U.S. 295 (1939).[14] Despite this fiduciary relationship, the federal securities laws do not require the dissemination of already-public information regarding a corporation's securities. *Sailors v. Northern States Power Co.*, 4 F.3d 610, 613 (8th Cir. 1993)("The securities laws require disclosure of information *that is not otherwise* in the public domain.")(emphasis added)(quoting *Acme Propane, Inc. v. Tenexco, Inc.*, 844 F.2d 1317, 1323 (7th Cir. 1988)); *Hillson Partners Ltd. Partnership v. Adage, Inc.*, 42 F.3d 204, 212 (4th Cir. 1994) (same).[15] While corporate law and ERISA share the same fiduciary underpinnings, the Third Circuit has, without any basis in law or logic, announced a much more stringent standard governing disclosures for investments held on behalf of participants in ERISA plans.

The practical effect of the ruling is to require fiduciaries to keep participants abreast of the status of the hundreds, if not thousands, of investments in a typical 401(k) plan (at a

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14. "A director is a fiduciary." *Twin-Lick Oil Co. v. Marbury*, 91 U.S. 587, 588 (1875). So is a dominant or controlling stockholder or group of stockholders. *Southern Pacific Co. v. Bogert*, 250 U.S. 483, 492 (1919). Indeed, the Third Circuit's disclosure requirements run counter to this Court's holding in *International Bhd. of Teamsters, Chauffeurs, Warehousers & Helpers v. Daniel*, 439 U.S. 551 (1979). *Daniel* emphasized the particularized nature of the disclosures required under ERISA, as opposed to federal securities laws:

> Unlike the Securities Acts, ERISA deals expressly and in detail with pension plans. ERISA requires pension plans to disclose specified information to employees in a specified manner, . . . in contrast to the indefinite and uncertain disclosure obligations imposed by the antifraud provisions of the Securities Acts . . . .

Id. at 569 (citations omitted).

15. The *Sailors* court traced the origin of the principle, that public information need not be disclosed, to this Court's opinion in *Shapiro v. Goldberg*, 192 U.S. 232, 241-42 (1904), which stated: "When the means of knowledge are open and at hand or furnished to the purchaser or his agent and no effort is made to prevent the party from using them . . . he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor." *Id.* This rule is also implicit in this Court's holding in *Basic, Inc. v. Levinson*, 485 U.S. 224, 248-49 (1988), that the presumption of fraud is rebutted when the market has access to accurate information.

time when regulatory burdens already threaten the availability of these plans). As one commentator has opined:

> Section 404(c) might not be the safe harbor most defined contribution plan sponsors think it is, a federal appeals court decision suggests. The decision — involving Unisys Corp. — also suggests the entrance to the safe harbor is far more difficult to navigate than most employers understand.

Patricia B. Limbacher, *404(c) Rules Harbor May Not Be So Safe,* Pension & Investments, Jan. 22, 1996, at 1. *See also* Ellen E. Schultz, *So Your 401(k) Had a Loss? Try Suing Your Boss,* The Wall St. J., Feb. 16, 1996, at B1, B3 ("The [*Unisys*] case, one of the first of its kind, worries employers, who fear it will lead to a sea of lawsuits."). To so engraft on section 404(c) duties derived from section 404(a) will, contrary to the legislative intent, dramatically drive up the costs of administering such a plan, while undermining, if not eliminating, the availability of the statutory 404(c) defense.

C.

The uncertainty created by the courts of appeals' confusion on the governing standard of review threatens both general economic disruption and the financial soundness of retirement planning for millions of Americans. Without the benefit of the deference owing under ERISA, recognized by this Court in *Varity*, fiduciaries will likely offer only more conservative investments in 401(k) pension plans. Such risk-averse investments will provide the only effective "safe harbor" for employers desirous of avoiding fiduciary liability, rather than seeking to maximize their employees' retirement savings and income. Moreover, the outflow of dollars from growth-oriented into "risk free" investments may derail current stock market trends and cause interest rates to rise as retirement funds gravitate to government and other fixed rate investment vehicles.

The Third Circuit's holding makes likely the occurrence of these events not directly, but indirectly, by construing too

narrowly the statutory exemption from fiduciary liability and thereby shifting the investment risk to employers and away from employees, all in contravention of ERISA. Indeed, employers will follow the path described, rather than undertake to comply with the court of appeals' holding, particularly as employers struggle to disclose to pension plan participants public information on the status of 401(k) savings plan investments, as the Third Circuit now requires.

The importance of the issues in this petition cannot be overstated. Defined contribution pension plans have enjoyed phenomenal growth in the last ten years, eclipsing the use of defined benefit plans to offer the potential for retirement income to retirees:

> Since the mid 1970s, the private pension system in the United States has undergone considerable change. The most notable development has been the increasing reliance on defined contribution plans over the traditional defined benefit plans. Between 1980 and 1985 alone, the number of primary defined contribution plans increased by 71 percent and the number of participants rose by 83 percent; in contrast, primary defined benefit coverage showed virtually no growth.

Robert L. Clark and Ann A. McDermed, *The Choice of Pension Plans in a Changing Regulatory Environment* 1 (American Enterprise Institute for Public Policy Research 1990).

Given the relationship between such plans and securities markets, the Third Circuit's ruling may have untoward consequences for the nation's economy. After *Unisys*, fiduciaries will likely limit the availability of equity offerings to participants, in favor of "safer" fixed income investments, typically money market funds and government securities. Such an exodus of capital from equities to fixed income investments may curtail recent equity market trends, while causing a rise in interest rates. *Cf.* Cynthia Mayer, *Bull Market May Just Go On and On,* Philadelphia Inquirer, March 3, 1996, at D1 ("Mutual

funds now control 13 percent of all equities, and a whopping 35 percent of those stocks are held in retirement funds.").[16]

Moreover, added limitations on the availability of equity investments to defined contribution plan participants may further undermine employees' ability to amass sufficient savings for retirement. In other words, the *Unisys* opinion may cause fiduciaries to limit the availability of more aggressive investment options, at a time when all recognize that participant choices have been far too conservative. To date, 401(k) participants have generally opted for conservative investments, potentially to their detriment:

> Employees are not investing wisely. Unlike professional investment managers who invest in diversified common stocks, most 401(k) savers invest in overly conservative money market funds, government bonds or their own company's stocks. Such strategies are poor when it comes to maximizing returns and achieving diversification.

John E. Petersen, *We're Ill-equipped to Run Our Own Retirement Plans,* Houston Chronicle, April 3, 1995, at 15. *See also* Leslie Wayne, *Pension Changes Raising Concerns,* N.Y. Times, Aug. 29, 1994, at A1 ("In contrast to the professional money managers who invest for a traditional pension plan, many workers continue to shun stocks, the investment that has best outpaced inflation during the last 50 years. Instead, many favor lower-yielding investments like money market funds that may not provide enough for their future needs.").[17] Moreover,

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16. *See also* Fred Williams, *Managers Hold Firm in Soaring Markets,* Pensions & Investments, Feb. 19, 1996, at 1 ("After 1995's bloated 37.48% return for the Standard & Poor's 500 Stock Index, the stock market is being fueled by massive liquidity from mutual funds and 401(k) plans ...."); James M. Poterba, Steven F. Venti & David A. Wise, *Do 401(k) Contributions Crowd Out Other Personal Saving?,* 58 J. of Public Economics 1, 5 (1995)("By 1991 almost one-quarter of all families participated in a 401(k)."); U.S. Dept. of Labor/Pension and Welfare Benefits Admin., Private Pension Plan Bulletin, *Abstract of 1991 Form 5500 Annual Reports* 3 (No. 4, Winter 1995)("The major factor in the higher growth of DC [defined contribution] plan assets has been a continuing positive cash inflow of contributions minus benefit payouts, which in 1991 amounted to $17 billion.").

17. According to another financial commentator, fixed-income invest-

to impress additional costs on defined contribution plan sponsors and fiduciaries may result in the curtailment of the availability of such plans, particularly among smaller employers. *Cf.* Christine Williamson, *Plan Execs Oppose 401(k) Audit Effort,* Pensions & Investments, Dec. 11, 1995, at 3 ("One reason so many U.S. workers aren't covered now by 401(k) plans is the cost and the complexity of complying with existing regulations.").[18] The *Unisys* opinion may have far reaching consequences for our nation's economy generally, and participants' ability to amass sufficient money for retirement.

NOTES *(Continued)*

ments pose a hidden risk to defined contribution plan participants:

> The no-growth risk: More than 40% of the money that workers contribute to their 401(k)s is interred in investments that pay steady interest but don't allow their principal to grow .... This includes fixed-income contracts, money-market funds and bond mutual funds. Inexperienced investors think their money is safe. But safe from what? They're overlooking the certain risk that inflation will gobble up their returns. After taxes (which they'll pay when they draw the money out), their purchasing power will hardly have grown at all.

Jane Bryant Quinn, *Employees Should Learn to Be Better Investors,* Rocky Mountain News, Sept. 26, 1994, at 40A.

18. Indeed, the mischief of the *Unisys* opinion will extend beyond the borders of the Third Circuit. ERISA's expansive jurisdictional provision allows for suit wherever a defendant "may be found" or where the "breach took place." 29 U.S.C.A. § 1132(e)(2)(West 1985). Hence, future plaintiffs, by suing in the Third Circuit, may readily circumvent unfavorable circuit authority elsewhere, so long as the defendant is found to have minimum contacts with the Third Circuit (an easy task given the number of Delaware corporations) or the plaintiff resides there. *E.g., Varsic v. United States District Court,* 607 F.2d 245, 248 (9th Cir. 1979)("Congress' choice of this term ['found'] for inclusion in the ERISA venue provision further supports our conclusion that the provision is intended to expand, rather than restrict, the range of permissible venue locations."); *see also Bonin v. American Airlines, Inc.,* 621 F.2d 635, 636 n.1 (5th Cir. 1980)("A potential ERISA plaintiff is granted a wide choice of federal court venue ....").

CONCLUSION

Based on the foregoing, petitioners request that the Court grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

LAURENCE Z. SHIEKMAN
Counsel of Record
BRIAN T. ORTELERE
PEPPER, HAMILTON
& SCHEETZ
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103-2799
(215) 981-4000

JOSEPH A. TEKLITS
UNISYS CORPORATION
P.O. Box 500 C2NW14
Blue Bell, PA 19424-0001

Attorneys for Petitioners

DATED: May 6, 1996

APPENDIX A

Filed January 4, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: UNISYS SAVINGS PLAN LITIGATION
JOHN P. MEINHARDT, on behalf of himself and all others similarly situated

v.

UNISYS CORPORATION
(D.C. Civil No. 91-CV-03067)

MICHAEL HECK; JOSEPH MCCARTHY; ANGELO DEPIETRO, on behalf of themselves and all others similarly situated

v.

UNISYS CORPORATION; THE ADMINISTRATIVE COMMITTEE OF THE UNISYS SAVINGS PLAN; THE INVESTMENT COMMITTEE OF THE UNISYS SAVINGS PLAN; JACK A. BLAINE; JOHN J. LOUGHLIN; KENNETH MILLER; DAVID A. WHITE; STEFAN RIESENFELD
(D.C. Civil No. 91-cv-03276)

GARY VALA, Individually and on behalf of all others similarly situated

v.

JACK A. BLAINE; MICHAEL R. LOSEY; KENNETH L. MILLER; STEFAN C. RIESENFELD; CURTIS A. HESSLER; DAVID A WHITE; UNISYS CORPORATION; THE NORTHERN TRUST COMPANY
(D.C. Civil No. 91-03278)

CAROLYN A. GOHLIKE, on behalf of herself and all others similarly situated

v.

UNISYS CORPORATION
(D.C. Civil No. 91-cv-03321)

DENNIS C. STANGA; JAMES M. COLLINS, on behalf of themselves and all others similarly situated

v.

UNISYS CORPORATION
(D.C. Civil No. 91-cv-04689)

JOHN H. BURGESS, JR., on behalf of himself and all others similarly situated

v.

UNISYS CORPORATION
(D.C. Civil No. 91-cv-04696)

John M. Meinhardt, Michael Heck, Joseph McCarthy, Angelo DiPietro, Gary Vala, Carolyn Gohlike, Dennis C. Stanga, James M. Collins and John H. Burgess, Jr.,
Appellants in No. 95-1156

IN RE: UNISYS SAVINGS PLAN LITIGATION

JOHN P. MEINHARDT, on behalf of himself and all others similarly situated

v.

UNISYS CORPORATION
(D.C. Civil No. 91-cv-03067)

BERNARD MCDEVITT, on behalf of himself and all others similarly situated

v.

UNISYS CORPORATION
(D.C. Civil No. 91-cv-03126)

PARKER C. KEAN, on behalf of himself and all others similarly situated

v.

UNISYS CORPORATION
(D.C. Civil No. 91-cv-03164)

NADIA F. SOS; FAROUK M. SOS, individually and on behalf of all others similarly situated

v.

UNISYS CORPORATION
(D.C. Civil No. 91-cv-03582)

KENNETH GOERS; JOHN J. CIESLICKI, on behalf of themselves and all others similarly situated

v.

UNISYS CORPORATION; THE NORTHERN TRUST COMPANY
(D.C. Civil No. 91-cv-04678)

WILLIAM TORKILDSON

v.

UNISYS CORPORATION
(D.C. Civil No. 91-cv-04754)

Bernard McDevitt, Parker Kean, Nadia F. Sos, Farouk M. Sos, Kenneth Goers, John J. Cieslicki and William Torkildson,
Appellants in No. 95-1157

IN RE: UNISYS SAVINGS PLAN LITIGATION

JOHN P. MEINHARDT, on behalf of himself and all others similarly situated

v.

UNISYS CORPORATION
(D.C. Civil No. 91-cv-03067)

HENRY ZYLLA; RICHARD SILVER; RONALD GRIPPO; EDWARD LAWLER; RICHARD ANDUJAR; CLARENCE MULLER; CHARLES WAHLER; JAMES MCLAUGHLIN; DONALD RADER; JOSEPH LAU; JAMES GANGALE; ALFRED CONTARINO; RICHARD COLBY; JOHN MARCUCCI; JOSEPH FIORE; RICHARD MASTRODOMENICO; NICK KLEMENZ; PETER SZCZYBEK; on behalf of themselves and all others similarly situated; ENGINEERS UNION LOCAL 444 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS,

A.F.L.-C.I.O.; LOCALS 445 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCALS 450 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCALS 470 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCALS 165 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, A.F.L.-C.I.O.

v.

UNISYS CORPORATION; EDWIN P. GILBERT; JOHN J. LOUGHLIN; THOMAS PENHALE, individually and in their capacities as members of the Unisys Employee Benefits Executive Committee and administrators of the Unisys Retirement Investment Plan; RICHARD H. BIERLY; CURTIS A. HESSLER; LEON J. LEVEL; KENNETH L. MILLER; DAVID A. WHITE; JACK A. BLAINE; STEFAN C. RIESENFELD; GEORGE T. ROBSON, individually and in their capacities as members of the Investment Committee of the Unisys Retirement Investment Plan
(D.C. Civil No. 91-cv-03772)

Henry Zylla, Richard Silver, Ronald Grippo, Edward Lawler, Richard Andujar, Clarence Muller, Charles Wahler, James McLaughlin, Donald Rader, Joseph Lau, James Gangale, Alfred Contarino, Richard Colby, John Marcucci, Joseph Fiore, Richard Mastrodomenico, Nick Klemenz and Peter Szczybek, individually and on behalf of the class certified,
Appellants in No. 95-1186

Appeals from the United States District Court
for the Eastern District of Pennsylvania

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* Argued
September 13, 1995

Before: Mansmann, Scirica and Nygaard, *Circuit Judges.*

(Filed January 4, 1996)

James R. Malone, Jr., Esquire
(Argued)
Michael D. Gottsch, Esquire
Chimicles, Jacobsen & Tikellis
361 West Lancaster Avenue
One Haverford Centre
Haverford, PA 19041

Joel C. Meredith, Esquire
Daniel B. Allanoff, Esquire
Meredith, Cohen & Greenfogel
117 South 17th Street
22nd Floor
Philadelphia, PA 19103

James I. Wasserman, Esquire
Julian R. Birnbaum, Esquire
Vladeck, Waldman, Elias & Engelhard
1501 Broadway
Suite 800
New York, NY 10036

Counsel for Appellants:
John M. Meinhardt, Michael Heck, Joseph McCarthy, Angelo R. DiPietro, Gary Vala, Carolyn, Gohlike, Dennis C. Stanga, James M. Collins, John H. Burgess, Jr., Bernard McDevitt, Parker Kean, Nadia F. Sos, Farouk M. Sos, Kenneth Goers, John J. Cieslicki, William Torkildson, Henry Zylla, Richard Silver,

Ronald Grippo, Edward Lawler, Richard Andujar, Clarence Muller, Charles Wahler, James R. McLaughlin, Donald Rader, Joseph Lau, James Gangale, Alfred Contarino, Richard Colby, John Marcucci, Joseph A. Fiore, Richard Mastrodomenico, Nick Klemenz, Peter Szczybek

Laurence Z. Shiekman, Esquire
(Argued)
Pepper, Hamilton & Scheetz
18th & Arch Streets
3000 Two Logan Square
Philadelphia, PA 19103-2799

Joseph A. Teklits, Esquire
Unisys Corporation
P.O. Box 500
M.S. C2NW 14
Blue Bell, PA 19424

Counsel for Appellees:
Unisys Corporation, Administrative Committee of the Unisys Savings Plan, Investment Committee of the Unisys Savings Plan, Jack A. Blaine, John J. Loughlin, Kenneth I. Miller, David A. White, Stefan C. Riesenfeld, Michael R. Losey, Curtis A. Hessler, Edwin P. Gilbert, Thomas Penhale, individually and

in their capacities as Benefits Executive Committee and administrators of the Unisys Retirement Investment Plan; Richard H. Bierly, Curtis A. Hessler, Leon J. Level, George T. Robson,

Marcia E. Bove, Esquire
Room N-4611
United States Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Counsel for Amicus-appellant Secretary of Labor

Mary Ellen Signorille, Esquire
American Association of Retired Persons
601 E. Street, N.W.
Washington, DC 20049

Counsel for Amicus-appellant American Association of Retired Persons

Robert N. Eccles, Esquire
Karen M. Wahle, Esquire
O'Melveny & Myers
555 13th Street, N.W.
Suite 500 West
Washington, DC 10004

Counsel for Amicus-appellees:

ERISA Industry Committee, American Standard Inc., Bethlehem Steel Corp., Merck & Co., Inc., Rockwell International Corp., Scott Paper Company, and USX Corporation

OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

This consolidated class action is brought pursuant to the Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. §1001 *et seq.* (1985 & Supp. 1995), and arises out of the collapse in 1991 of the Executive Life Insurance Company of California. The plaintiffs, participants in individual account pension plans that Unisys Corporation maintained for its employees, alleged, *inter alia*, that the defendants breached ERISA's fiduciary duties of prudence and diversification by investing plan assets in Executive Life guaranteed investment contracts, as well as ERISA's fiduciary duty of disclosure by providing participants with misleading or incomplete communications regarding these investments and Executive Life's financial condition. In their defense, the defendants raised a question of first impression, asserting that section 1104(c) of the Act, which relieves fiduciaries of liability for losses which result from a plan participant's exercise of control over individual account assets, applies. The plaintiffs appeal the district court's decision to grant the defendants' motion for summary judgment on the plaintiffs' breach of fiduciary duty claims.

We conclude that there are genuine issues of material fact as to whether the defendants breached section 1104(a)'s fiduciary duties and as to whether the defendants are entitled to section 1104(c)'s protection. We will, therefore, vacate the district court's grant of summary judgment in the defendants' favor and will remand the case to the district court for further proceedings.

I.

We begin our analysis by reviewing the evidence of record. In the fall of 1986, Burroughs Corporation and Sperry Corporation merged to form Unisys. Prior to the merger, both Sperry and Burroughs had maintained retirement savings plans for employees known as the Sperry Retirement Program - Part B (the "Sperry Plan") and the Burroughs Employees Savings Thrift Plan (the "BEST Plan"), respectively. Each plan permitted an employee to contribute a percentage of his or her compensation into an individual account and to direct that it be invested in any one or a number of funds that were comprised of different types of investments. One of the funds in both of these plans invested in guaranteed investment contracts ("GICs") issued primarily by insurers. A GIC is a contract under which the issuer is obligated to repay the principal deposit at a designated future date and to pay interest at a specified rate over the duration of the contract.

Following the merger, the Sperry Plan and the BEST Plan were consolidated to form the Unisys Savings Plan, which took effect on April 1, 1988.[1] Like its predecessors, the Unisys Savings Plan established an individual account for each participant and offered several fund alternatives into which a participant could direct contributions on a tax-deferred basis: the Diversified Fund, the Indexed Equity Fund, the Active Equity Fund; the Unisys Common Stock Fund; the Short Term Investment Fund, and the Insurance Contract Fund.[2]

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1. The parties agree that the Unisys Savings Plan is an "individual account plan" within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1101 *et seq.* (1985 & Supp. 1995). Section 1002(34) of the Act provides:

§ 1102. Definitions

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

29 U.S.C. §1002(34).

2. The Plan also accepted "after-tax" and "tax-deductible" contribu-

The Insurance Contract Fund invested in GICs. The old Sperry Plan Fixed Income Fund, a vehicle for GICs, continued to exist, but was closed to new contributions. As GICs matured, assets invested in the Fixed Income Fund were reinvested in the new Insurance Contract Fund; assets in the BEST Plan equivalent, the Guaranteed Investment Contract Fund, were likewise reinvested in that Fund, unless a participant specified otherwise.[3] Contributions to the Insurance Contract Fund were allocated on a pro rata basis among the various GICs held therein.

The Unisys Savings Plan allowed a participant to transfer assets from one equity fund to another on a monthly basis. Due to transfer limitation terms that were included in the contracts purchased for the GIC Funds, however, asset transfers involving those Funds were restricted. For example, all transfers between any of the GIC Funds and the Short-Term Investment Fund, another low-risk, interest-earning vehicle, were absolutely prohibited. Moreover, if assets were transferred from one of the GIC Funds to the equity or Unisys common stock funds, a year had to pass before any assets could be transferred to the Short-Term Investment Fund; similarly, if assets were transferred from the equity or the Unisys common stock funds to the Short-Term Investment Fund, a year had to transpire before any assets could be transferred out of one of the GIC Funds.[4]

NOTES *(Continued)*

tions that had been made under the prior plans as well as transfers from other qualified plans or individual retirement accounts. The Plan further provided for matching company contributions in the form of shares of Unisys common stock.

3. For the sake of convenience, the BEST Plan Guaranteed Investment Contract Fund, the Sperry Plan Fixed Income Fund, and the Unisys Savings Plan Insurance Contract Fund will be referred to collectively as the "GIC Funds

4. In addition, the Plan placed a six-month restriction on the transfer of assets to the Insurance Contract Fund from the equity or Unisys common stock funds if those assets had been previously transferred from the Short-Term Investment Fund, as well as several other restrictions of six months or a year's duration when transfers were made to or from the Best Plan Guar-

Because the Plan was designed to make final distribution of a participant's account on retirement, death, disability or employment termination, withdrawals of tax-deferred contributions prior to those events were limited to circumstances of "financial hardship" and were generally taxable as ordinary income, plus 10%.

In addition to the Unisys Savings Plan, Unisys established the Unisys Retirement Investment Plan ("RIP") and the Unisys Retirement Investment Plan II ("RIP II") for unionized employees, which for all intents and purposes were identical to the Unisys Savings Plan.[5] Contributions to the Plans designated for investment in the Fixed Income Fund or the Insurance Contract Fund were invested together.

Unisys was the Plans' administrator; the Administrative Committee, established by the Unisys Board of Directors, carried out the Plans' provisions; and the Investment Committee, also established by the Board, was responsible for the Plans' investments. The Investment Committee delegated day-to-day investment management responsibility for the GIC Funds to two of the Investment Committee's members, defendants David White and Leon Level, and appointed outside managers to manage investments in the Plans' other funds.

From time to time White and certain members of his staff, including William Heller, Robert Rehley and Charles Service, conducted a bid among insurers during which GIC contracts were selected for the appropriate GIC Fund. These selections were subject to Level's approval and reported to the Investment Committee. White and his staff did not have written guidelines for the bidding process or contract selection; they did, however, have informal operating policies and procedures. In particular, they developed a rule that no more than 20% of GIC Fund assets would be invested with any one issuer.

After the merger in 1986, but before the effective date of the Plans in April, 1988, two bids for the Fixed Income Fund

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anteed Investment Contract Fund or the Sperry Plan Fixed Income Fund.

5. Again, for the sake of convenience, the Unisys Savings Plan, the Unisys Retirement Plan ("RIP") and the Unisys Retirement Plan II ("RIP II") will be referred to collectively as the "Plans."

were held. The first bid occurred on June 9, 1987, in the offices of Murray Becker of Johnson & Higgins, a consultant which Sperry had used to assist in GIC selections. Prior to bid day, Becker mailed bid specifications on Unisys' behalf to a number of insurers, including the Executive Life Insurance Company of California, inviting them to make a GIC proposal. It was Johnson & Higgins' practice to solicit bids only from insurers with a superior AAA rating as to claims-paying ability from Standard & Poors Corporation. At the time, Standard & Poors had rated Executive Life as a AAA company. Likewise, A.M. Best Company, another rating agency, had assigned Executive Life its highest rating of A+. According to Becker, however, the A+ from A.M. Best was of marginal significance since A.M. Best was overly generous with its ratings.

On the day of the bid, White, his staff and Becker reviewed material that Executive Life provided concerning the insurer's financial condition and interviewed Executive Life representatives about the company's outlook. The group then discussed the Executive Life GIC proposal. As was his custom, Becker noted that the prospect of purchasing Executive Life GICs was "controversial" in light of the "junk bonds" Executive Life held in its portfolio. Junk bonds are non-investment securities which carry an above-average credit risk and return. Taking their cue from Standard & Poors, which was of the view that the risk generated by Executive Life's junk bond investments was offset by other conservative aspects of the insurer's investment strategy, White and his staff were not deterred from investing in Executive Life. Becker warned, however, that the Standard & Poors AAA rating was reliable only as long as Executive Life's junk bond holdings did not exceed 35% of its bond portfolio. Ultimately, Becker recommended that Unisys consider the purchase of a three-year GIC from Executive Life. While White accepted Becker's advice to invest in Executive Life, he rejected Becker's view as to the contract's duration. In order to acquire the highest interest rate that Executive Life offered, 9.45%, White purchased a five-year Executive Life GIC for approximately $30 million. GIC bids from Travelers Insurance Company and Seattle First Bank were also accepted.

Subsequent to the June 9, 1987 bid, White and Level terminated Johnson & Higgins and did not hire a replacement, believing that Unisys personnel could select appropriate GICs without the help of a consultant. A second competitive GIC bid for the Fixed Income Fund took place on December 2, 1987. Relying heavily on Executive Life's ratings, which had not changed since June 9, 1987, White invested just over $135 million into another five-year Executive Life GIC paying 9.75% in interest. Contracts were purchased from Seafirst Bank and Travelers Insurance Company as well, bearing interest rates of 9.25% and 9.15% respectively.

Shortly thereafter, on January 13, 1988, Unisys sponsored a GIC bid for the Insurance Contract Fund. Once again, based on the high marks Executive Life continued to receive from the rating agencies, White invested about $46 million in a third five-year, 9.48% interest-paying Executive Life GIC, bringing the total investment in GICs issued by Executive Life to $213 million.

Communications to participants regarding the GIC Funds, beginning with BEST Plan and Sperry Plan documents, described the Funds as designed to preserve capital and accumulate interest and consistently emphasized that investments in GICs were "guaranteed" by the issuing insurers. BEST Plan materials stated that the goal of the Guaranteed Insurance Contract Fund was "to preserve the amount invested and to guarantee a rate of return", and provided that "[i]n addition to the interest earned, the insurance company guarantees the principal of the fund[]. . .[and that] your account cannot go down in value; it will always be worth as much as you put in plus your share of the interest earned under the contract." Similarly, with respect to the Fixed Income Fund, Sperry Plan materials declared that "each year's minimum [interest] rate is guaranteed for an entire year."

Likewise, the prospectuses for the Plans, distributed in the Spring of 1988, stated that the Insurance Contract Fund was intended "to preserve capital while earning interest income[]" and described the Fund as "invested in contracts with insurance companies and other financial institutions which guarantee repayment of principal with interest at a

fixed or fixed minimum rate for specified periods. . . ." The Unisys Savings Plan prospectus noted, however, that [Unisys] does not guarantee the repayment of principal or interest." Although the 1988 RIP and RIP II original prospectuses did not include this caveat, it was subsequently included in a 1988 supplement to each. Additionally, the Plans' prospectuses pointed out that assets of the Insurance Contract Fund were invested in contracts issued by, *inter alia*, Executive Life.

The 1988 Summary Plan Descriptions ("SPD"s) for the Plans provided that the investment objective of the Insurance Contract Fund was to "[p]reserve the amount invested while earning interest income[]", described the Funds' investment strategy as "[t]ypically contracts of between 3 and 7 years with various insurance companies and other financial institutions which guarantee the principal and a specified rate of return for the life of each contract", and explained that the future performance of any of the funds was not certain:

> [b]enefits available are based on your savings plan value at the time of distribution. Your payments from the Plan are subject to the performance of the funds in which your accounts are invested. If the value declines, you may receive less from the Plan than you and the Company contributed.

With respect to the Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. § 1001 *et seq.* (1985 & Supp. 1995), the 1988 and 1990 prospectuses for the Plans pointed out:

> the Plan is subject to some, but not all, of the provisions of the [Act]. . .which [a]mong other things. . .set minimum standards of fiduciary responsibility, establish minimum standards for participation and vesting, and require that each member be furnished with an annual report of financial condition and a comprehensive description of the member's rights under the Plan.

The Plans' SPDs informed the participants:

> you are entitled to certain rights and protections under [ERISA]. . . .In addition to creating rights for Plan partici-

> pants, ERISA imposes duties upon the people who are responsible for the operation of employee benefit plans. The people who operate the [Unisys Savings Plan, the Unisys Pension Plan, RIP, and RIP II], called 'fiduciaries' of the Plans, have a duty to [operate] prudently, in your interest and that of all members and beneficiaries.

After the prospectuses and the SPDs were distributed, the Investment Committee received correspondence in 1988 and 1989 from individual participants, including Henry Zylla, the president of one of Unisys' local unions who wrote on behalf of the union's members, questioning whether Executive Life GICs should have been purchased for the Plans, given the insurer's high risk investments. In responding correspondence, Unisys stated that the Committee did not invite "risky" companies to its GIC bids, that its GIC selection process continuously emphasized "safety" and that all of the contracts it selected for the GIC Funds carried investment-grade credit ratings.

In January of 1990, some two years after Unisys' last Executive Life GIC purchase, Executive Life announced that it had written down $515 million in assets due to losses in its bond portfolio. Following this announcement, Executive Life's credit ratings were lowered from AAA to A by Standard & Poors; from A+ to A by A. M. Best; and from A1 to BAA2 by a third rating company. Moody's Investor's Service.

Concerned that a flood of policy and other contract surrenders would cause a liquidity crisis that it would be unable to overcome, Executive Life began meeting with its investors to discuss its financial condition. When representatives of Executive Life and Unisys met on January 31, 1990, Executive Life articulated reasons for asserting that it would continue to meet its obligations and survive intact the situation it faced.

The next day, Thomas Penhale, an employee in Unisys' Human Resources department, sent to defendant Michael Losey, a Vice President of Human Resources, a copy of a newspaper article on Executive Life with a hand-written note, stating: "[defendant] John L[oughlin] got this today. It is not as 'comforting' as Exec[utive] Life led us to believe yester-

day." In a memorandum to the Investment Committee dated February 2, 1990, however, White, who attended the January 31 meeting with Executive Life, expressed the view that the insurer "appears to be in reasonably good shape to weather the storm."

On February 5, 1990, members of the Investment Committee and other interested Unisys personnel met to discuss, *inter alia*, the questions Unisys had received from participants regarding Executive Life's status and the disclosures the company would make to the Plans' participants about the insurer. After some debate, the group decided that Unisys would disseminate information to all participants regarding Executive Life's condition through an updated prospectus and an accompanying cover letter.

In late March, 1990, Unisys sent to each participant a revised prospectus which stated generally that "an investment in any of the investment funds involves some degree of risk[]" and that many factors, including the "financial stability of the institutions in which assets are invested, the quality of the investment portfolios of those institutions, and other economic developments will affect. . .the value of a [participant's] investment in those funds." In bold letters, the prospectuses added that "[a]s a result, there is no assurance that at any point in time the value of an investment in any fund will not be lower than the original amount invested."

As for the Insurance Contract Fund, the revised prospectus stated that its "objective. . .is to preserve capital while earning interest income[]", characterized its investments as "contractual obligation[s]" of the issuer, and pointed out that the "repayment of principal and interest is necessarily subject to the [issuer's] ability to pay. . .[such that] a downturn or loss in one or more areas of the [issuer's] investment portfolio could have an adverse effect on the stability of the [issuer]." Like the April 1, 1988 prospectus, the revised prospectus stated that "[Unisys] does not guarantee the repayment of principal or interest[]"; it also informed participants that the Investment Committee's guidelines required that Unisys purchase GICs from insurers rated "Secure" by Standard & Poors, or "Highest Investment Quality" by Moody's Inves-

t[ors] Service, or "Superior" or "Excellent" by A. M. Best, but that "[c]ontracts issued by an insurance company or other institution whose rating is downgraded subsequent to selection may continue to be held in the fund." Finally, Executive Life was identified as one of the companies from which GICs had been purchased.

With the 1990 prospectus, participants received a letter from defendant Jack A. Blaine, a Vice President of Human Resources, encouraging participants to review the prospectus carefully and reminding them that Unisys would not give advice as to appropriate investment strategy. The letter responded to questions concerning the "troubled 'junk bond' market and the effect, if any, that such problems would have on the [GIC Funds]" by pointing out that the repayment of principal and interest under GICs necessarily and entirely depended on the ability of the insurer to meet its obligations; that Unisys did not guarantee the repayment; and that the financial stability of an insurer depended on the success of its own portfolio, such that an investment in junk bonds could have an adverse effect on financial stability. Lastly, the letter provided that only those institutions with a "secure" credit rating at the time of a contract bid would be selected for investment.

Although a draft of Blaine's letter had made specific mention of Executive Life, the letter the participants eventually received did not. The draft's reference to Executive Life's $515 million asset writedown was removed; a statement disclosing the magnitude of the proportion of Fixed Income and Insurance Contract Fund investments in Executive Life was crossed out because it "could cause panic"; and a statement about informative news articles was deleted because it "could cause more concern." A comment on the draft stated: "The overall content and tone do [not] sooth[e] any fears and may in fact stir more interest in this subject than it deserves."

Blaine's letter was accompanied by an enclosure that listed all of the GICs held in the GIC Funds at that time, with investment value, maturity dates, and the bid day and current ratings of the issuing insurer. The enclosure revealed that Executive Life GICs had a combined book value of over $200

million, maturity dates of June, 1991, June and September, 1992, and March, June and August, 1993. It also showed the recent decline in ratings that Executive Life had suffered. The 1990 prospectus and the letter from Blaine with the enclosure were the only communications Unisys made to all participants on a systematic basis subsequent to Executive Life's January, 1990 announcement.

At about the same time, Unisys distributed to its benefits administration personnel a copy of a February 23, 1990 letter from Fred Carr, Executive Life's Chairman and President, which portrayed the company as "healthy", "financially strong", and "capable of providing all the benefits promised[]", and written responses to specific questions about Executive Life for use in addressing concerns that individual participants directed their way. According to Losey's deposition testimony, individual participants who asked employees in the Human Resources department "[w]ell, gee, how many people ever lost their money in this kind of thing[?]" would be told, "I don't remember one time they even halfway defaulted." In March, 1990, Unisys also met with union employees and responded to participants' inquiries about Executive Life's financial status.

Unisys did not, however, disclose two decisions it had reached: one involving its chairman's retirement annuity and the second, an Investment Committee resolution. With respect to the first, a few months after sending the revised prospectus to participants, Unisys replaced a $500,000 retirement annuity issued by Executive Life for Unisys' then Chairman, Michael Blumenthal, with an annuity from another insurer at some expense to the company. The second matter occurred at an Investment Committee meeting on August 10, 1990, during which was discussed, *inter alia*, the course of action the Plans would take in the event of a Executive Life default. The Committee ultimately resolved "that in the event of a default in any of the guaranteed investment contracts. . .distribution to plan participants will be reduced by that portion of the participant's account held in the defaulted contract."

Seeking to reduce the waiting period for asset transfers between "non-competing" funds and the GIC Funds from

twelve months to six, Unisys contacted the issuers from whom GICs had been purchased and asked that they agree to appropriate contract modifications. In exchange for Executive Life's consent to a waiting period reductive in the contracts it had issued to the Plans, Unisys executed a letter agreement on October 17, 1990 which provided in pertinent part:

> Unisys Corporation hereby further agrees that neither it nor its affiliates, employees, agents or other representatives will communicate with Plan participants regarding the financial condition or prospects of Executive Life nor issue any other communication regarding Executive Life which could be reasonably viewed as attempting to influence the investment choices of Plan participants without first obtaining Executive Life's written approval of such communication. In the event such prior written approval is not obtained, Executive Life may elect to not honor employee requests for withdrawals or reallocations provided that Executive Life reasonably believes that such requests were the direct result of such communication.

During this time, Executive Life's condition was widely reported in the financial press. Eventually, on April 11, 1991, the California Commissioner of Insurance seized Executive Life, placing it in conservatorship, and on April 12, 1991, issued a moratorium on all payments from the insurer. As a result, Unisys isolated and froze the balance in any participant account invested in Executive Life by way of the Fixed Income and/or Insurance Contract Funds. At this time, 30% of the Fixed Income Fund and 7% of the Insurance Contract Fund were invested with the insurer. On December 6, 1991, the Superior Court of California declared Executive Life insolvent.

In 1991, several classes composed of Unisys employees who participate in one of the Plans and have account balances invested in Executive Life and the unions which represent Unisys employees commenced twelve separate actions against Unisys, the Investment and Administrative Committees of the Unisys Board of Directors and individuals who allegedly had served on one or both of the Committees.

By Pretrial Order dated November 4, 1991, the twelve cases were consolidated for all purposes, except trial. Pursuant to this Order, on November 25, 1991, the plaintiffs filed a three count second amended consolidated class action complaint against the above-named defendants.[6] In Count I, all of the plaintiffs assert under sections 1045, 1104, 1105, 1109 and 1132 of ERISA, that Unisys breached fiduciary duties: by investing in Executive Life GICs; by failing to monitor the investments and divest them from the Plans;[7] by failing to diversify the GIC Funds' assets; and by failing to provide adequate disclosures to participants regarding "the composition of the portfolios" of the Fixed Income and Insurance Contract Funds and the "status of Executive Life's financial condition and the effect of [the insurer's] insolvency on their investment. . . ." In Count II, they assert that Unisys violated ERISA's reporting and disclosure requirements set forth in sections 1021(a), 1022(a)(1)(b) and 1023(b) by not furnishing an adequate summary plan description and an annual or other periodic report which would have apprised the plaintiffs that investments in the Fixed Income and Insurance Contract Funds were in jeopardy due to Executive Life's financial condition. In Count III, the union plaintiffs claim that Unisys' decision to invest in Executive Life and the actions it took when the insurer was placed in conservatorship breached certain collective bargaining agreements in violation of section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 141 *et seq.* (1973 & Supp. 1995).

In answer to the plaintiffs' ERISA claims, Unisys denied the allegations in the second amended complaint and asserted by way of a defense that 29 U.S.C. § 1104(c), which provides in part that "no person who is otherwise a fiduciary shall be liable under [Part 4 — Fiduciary Responsibility] for any loss, or by reason of any breach, which results from [a] participant's

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6. In their briefs, the defendants refer to themselves collectively as "Unisys". We will adopt the designation from this point forward.

7. It appears from the plaintiffs' briefs that they no longer pursue their allegations that Unisys breached fiduciary duties by failing to monitor the Executive Life investments and divest them from the Plans.

or beneficiary's exercise of control [over the assets in his account]", relieves it of liability.

On July 22, 1994, Unisys filed a motion for summary judgment, requesting, *inter alia*, that judgment be entered in its favor as to all counts of the second amended complaint.

On January 25, 1995, the district court granted Unisys' motion on the plaintiffs' ERISA claims (Counts I and II) and denied the motion as to the union plaintiffs' Labor Relations Management Act claim (Count III).[8] In its opinion, the district court began its analysis with what it designated as the plaintiffs' ERISA " 'Adequate Information' and Control Claim"; after setting forth the elements of an adequate summary plan description, the court turned immediately to Unisys' section 1104(c) defense. Considering whether the Plans' SPDs and prospectuses provided "the specific warnings required by ERISA and case law to allow the participants to exercise control over their investments", the court concluded that Unisys had provided the "required information and warnings" by advising participants that " '[Unisys] does not guarantee the repayment of principal or interest[]' " and "[t]here were no guarantees on their investments." Noting that the Plans were "voluntary" and that "consistent with ERISA § 404(c), the plans gave participants the option to invest their contributions in one or more of six funds[]," with the SPDs stating that

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8. In its motion for summary judgment, Unisys also requested that the plaintiffs' jury demand be stricken and argued that plaintiffs are not entitled to either punitive damages or other extra-contractual remedies under ERISA. Finding that the plaintiffs seek equitable relief under ERISA, the district court ruled that the plaintiffs are not entitled to a jury trial on Counts I and II. The court retained the union plaintiffs' jury trial demand on Count III because it held that the union plaintiffs' claim under the Labor Management Relation Act, 1947, 29 U.S.C. § 141 *et seq.* (1973 & Supp. 1995), raises a legal issue.

The plaintiffs did not appeal the court's decision to grant summary judgment on Count II or its decision to strike the jury trial demand on Counts I and II. Likewise, Unisys did not appeal the district court's denial of summary judgment or its refusal to strike the jury demand as to Count III.

The court did not address Unisys' contention that ERISA does not allow the plaintiffs to recover punitive or other extra contractual damages. The parties have not raised this issue on appeal.

" '[y]ou direct how your before-tax contributions are invested[]' ", the court also concluded that the participants had control over their assets.

Turning next to the plaintiffs' various claims in Count I for breach of ERISA's fiduciary duties, the district court disposed of the failure to disclose claim by holding that even though "[t]he duty to disclose material information is the core of a fiduciary's responsibility' ", a " 'significant exception to the rules governing fiduciaries applies to plans that permit participants to exercise control over individual accounts assets.' "

With regard to the plaintiffs' assertion that the investment in Executive Life GICs was imprudent, the court ruled that "Unisys met the requirements of the 'experienced prudent person[]' " having based its decision to invest in Executive Life on appropriate grounds:

> Unisys examined the financial statements of Executive Life, all of which indicated that it was sound. It sought the opinion of an expert, who advised that Executive Life was a good investment. Most significantly, Unisys relied on the ratings of Standard & Poors and Moody's, both of which gave Executive Life high ratings of A+ or AAA.... With all of the information available to it at the time, Unisys clearly made prudent business and investment decisions. Plaintiffs cannot not now use 20/20 hindsight to impose liability on Unisys.

The district court did not address the plaintiffs' claim in Count I that Unisys failed to satisfy ERISA's duty of diversification.

Judgment on Counts I and II of the second amended complaint was entered on January 26, 1995, and this consolidated appeal by the plaintiffs followed.[9]

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9. Appeals in eleven of the twelve consolidated cases are from final judgments as the entry of summary judgment in Unisys' favor in those eleven finally resolved all of the claims between the parties. In the twelfth action, where the union plaintiffs assert the Labor Management Relations Act claim, the district court's grant of summary judgment for the defendants on only the ERISA claims does not dispose of all the claims between the parties. Accordingly, for purposes of appeal, the plaintiffs in that action sought the district court's certification pursuant to Fed. R. Civ. P. 54(b),

II.

In examining the issues raised on appeal, we begin with settled principles of procedure involving summary judgment.[10] Summary judgment should be granted where the record reveals that no genuine issue of material fact exists for resolu-

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which was granted.

Because the twelve cases were not consolidated for trial, even though the district court's order granting summary judgment to Unisys on Counts I and II of the second amended consolidated complaint does not dispose of all of the claims in the twelve consolidated actions, it is a final, appealable order within the meaning of 28 U.S.C. § 1291. *Hall v. Wilkerson*, 926 F.2d 311, 314 (3d Cir. 1991) (holding that the dispositive factor in determining whether an order disposing of less than all claims in a consolidated case is appealable is whether the consolidation was for all purposes).

10. On review of the district court's award of summary judgment, we are required to apply the same test the district court should have used initially. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). When deciding a motion for summary judgment, a district court's role remains circumscribed in that it is inappropriate for a court to resolve factual disputes and to make credibility determinations. *Country Floors Inc. v. Partnership Composed of Gepner and Ford*, 930 F.2d 1056, 1061 (3d Cir. 1991). Even where a case will be heard without a jury, the court on summary judgment does not sit as the trier of fact: it only determines whether there are issues which must be tried. *Medical Inst. of Minnesota v. National Ass'n of Trade and Technical Schools*, 817 F.2d 1310, 1315 (8th Cir. 1987). To raise a genuine issue of material fact the opponent need not match, item for item, each piece of evidence proffered by the movant. *Big Apple, BMW Inc. v. BMW of N. Am. Inc.*, 974 F.2d 1358, 1362 (3d Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1262 (1993). In practical terms, if the opponent has exceeded the "mere scintilla" threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent. *Id.* It thus remains the province of the factfinder to ascertain the believability and weight of the evidence. *Id.*

The party opposing the motion is entitled to have his allegations taken as true, to receive the benefit of doubt when his assertions conflict with those of the movant and to have inferences from the underlying facts drawn in his favor. *Big Apple, BMW*, 974 F.2d at 1362-63. Ambiguities and conflicts in a deponent's testimony are generally matters for the fact-finder to sort out. *Wilson v. Westinghouse Elec. Corp.*, 838 F.2d 286, 289 (8th Cor. 1988). Any "unexplained gaps" in materials submitted by the moving party, if pertinent to the material issues of fact, justify denial of the motion. *O'Donnell v. United States*, 891 F.2d 1079, 1082 (3d Cir. 1989).

tion at trial and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). On summary judgment, the moving party need not disprove the opposing party's claim, but does have the burden to show the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1985). If the movant meets this burden, then the opponent may not rest on allegations in pleadings, but must counter with specific facts which demonstrate that there exists a genuine issue for trial. Further, even if the facts are undisputed, summary judgment may not be granted where there is disagreement over inferences that can be reasonably drawn from those facts. As in this case, when the nonmoving party will bear the burden by showing that the nonmoving party has not offered evidence sufficient to establish the existence of an element essential to its case. *Id.* at 322.

With these principles in mind, we turn first to the plaintiffs' claim that Unisys committed several breaches of ERISA's fiduciary duties. We turn second to Unisys' assertion that the defense set out in section 1104(c) applies in this case.

III.

Our analysis commences with the fiduciary responsibility provision of the Employee Retirement Income Security Act of 1974. ("ERISA"), 29 U.S.C. § 1001 *et seq.* (1985 & Supp. 1995). Section 1104(a) imposes several duties upon fiduciaries which include the duty of loyalty, the duty to act prudently, and the duty to diversify plan investments. Section 1104(a) provides in pertinent part:

> § 1104. Fiduciary duties
>
> (a) Prudent man standard of care
>
> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries. . .
>
> . . . .
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent

> man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so[] . . .

29 U.S.C. § 1104(a)(1)(B)(C).

When we apply section 1104(a) to the facts of a particular case, we remain mindful of ERISA's underlying purposes: to protect and strengthen the rights of employees, to enforce strict fiduciary standards, and to encourage the development of private retirement plans. 29 U.S.C. § 1001; H.R. Rep. No. 533, 93d Cong. 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4639-43. We also bear in mind that Congress has instructed that section 1004 "in essence, codifies and makes applicable to . . . fiduciaries certain principles developed in the evolution of the law of trusts." S. Rep. No. 127, 93 Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4865.

A.

In Count I of the second amended complaint, the plaintiffs allege, *inter alia*, that Unisys breached section 1104(a)(1)(B) by making imprudent investments of plan assets in Executive Life. Unisys contends that, to the contrary, the evidence establishes that the purchases of the Executive Life GICs were prudent under ERISA as a matter of law, thereby entitling it to summary judgment.

Under the common law of trusts, a trustee is duty-bound "to make such investments and only such investments as a prudent [person] would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived . . . ." Restatement (Second) of Trusts § 227 (1959). Further, a trustee is required to use due care, which means he must investigate the safety of the investment and its potential for income by securing reliable information, and may take into consideration the advice of qualified others, as long as he exercises his own judgment; to use the

skill of a man of at least ordinary intelligence; and to use caution, with a view to the safety of the principal and to the securing of a reasonable and regular income. *Id.* cmts. (a)-(c), (e). Where a trustee has acted properly in selecting an investment depends upon the circumstances at the time when the investment is made and not upon subsequent events. Thus, if at the time an investment is made, it is an investment a prudent person would make, there is no liability if the investment later depreciates in value. *Id.* cmt. o.

Consistent with these common law principles, the courts measure section 1104(a)(1)(B)'s "prudence" requirement according to an objective standard, focusing on a fiduciary's conduct in arriving at an investment decision, not on its results, and asking whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment. *Roth v. Sawyer-Cleator Lumber Co.,* 16 F.3d 915, 917-18 (8th Cir. 1994); *Fink v. National Savings and Trust Co.,* 772 F.2d 951, 955- 56 (D.C. Cir. 1985); *Katsaros v. Cody,* 744 F.2d 270, 279 (2d Cir.), *cert. denied,* 469 U.S. 1072 (1984); *Donovan v. Mazzola,* 716 F.2d 1226, 1232 (9th Cir. 1983), *cert. denied,* 464 U.S. 1040 (1984). In addition, the prudence requirement is flexible, such that the adequacy of a fiduciary's independent investigation and ultimate investment selection is evaluated in light of the " 'character and aims' " of the particular type of plan he serves. *Donovan v. Cunningham,* 716 F.2d 1455, 1467 (5th Cir. 1983), *cert. denied,* 467 U.S. 1251 (1984).[11]

In this case, our in-depth analysis of the evidence convinces us that Unisys has failed to carry its burden on summary judgment of showing the absence of any genuine issue of material fact as to whether its course of conduct and deci-

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11. Similarly, the Department of Labor regulation concerning the investment duties of ERISA fiduciaries provides that the requirements of section 1104(a)(1)(B) of the Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. § 1001 *et seq.* (1985 and Supp. 1995), are satisfied if fiduciaries give "appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment plays in that portion of the plan's investment portfolio. . ." 29 C.F.R. § 2550.404a-1(b)(i).

sion to invest in five-year Executive Life GICs in June and December 1987 and January of 1988 for the Fixed Income and Insurance Contract Funds satisfied ERISA's duty of prudence.

We begin with the most basic of ERISA's investment fiduciary duties, the duty to conduct an independent investigation into the merits of a particular investment. When David White, Unisys' Vice President of Capital Management and Trust Investments, was asked at his deposition to describe the evaluation he and his staff performed at the time of the June 9, 1987, bid to satisfy themselves that Executive Live was financially sound, he responded that they depended on the research that he "believed" Unisys' consultant, Johnson & Higgins, had completed:

> Q. Other than the financial information provided to you by the companies and the ratings of the agencies of which you just spoke, did you have any other review done of the financial status of the insurance companies that were bidding?
>
> A. I don't know how to answer that clearly, but what was done was we relied on Murray's staff, also. It was conducted at his office. He, in this case — we had never bid Executive Life, you know, for the Burroughs plan and it was Murray's relationship in effect and he had done, I believe, independent research. Otherwise, he would not have recommended Executive Life to us. So we had that recommendation.

In his deposition, however, Murray Becker of Johnson & Higgins did not confirm that Johnson & Higgins provided research to White and his staff:

> Q. Did you have a research staff at Johnson & Higgins?
>
> * * *
>
> A. Research as to what?
>
> * * *
>
> Q. As to the insurance companies?

A. Johnson & Higgins had a committee that I was not involved in that approved insurance companies that Johnson & Higgins was permitted to use. This was general for property casualty and life companies across the board.

* * *

Q. Were there individuals at the company whose responsibility if was to analyze the credit worthiness of various insurance companies?

* * *

A. Johnson & Higgins didn't represent itself as a credit-rating agency so it did not provide a credit research service. And in my part of Johnson & Higgins, we simply adopted a standard of recommending companies that were recommended — that a client consider companies that had a Triple A rating, and not consider companies that didn't have a rating, or were rated below Triple A.

While we would encourage fiduciaries to retain the services of consultants when they need outside assistance to make prudent investments and do not expect fiduciaries to duplicate their advisers' investigative efforts, we believe that ERISA's duty to investigate requires fiduciaries to review the data a consultant gathers, to assess its significance and to supplement it where necessary. In our view, a reasonable factfinder could infer from this evidence that Unisys failed to analyze the bases underlying Johnson & Higgins' opinion of Executive Life's financial condition and to determine for itself whether credible data supported Johnson & Higgins' recommendation that Unisys consider investing plan assets with the insurer. A reasonable factfinder could also conclude that Unisys passively accepted its consultant's positive appraisal of Executive Life without conducting the independent investigation that ERISA requires.

Likewise, the record calls into question the sufficiency of the investigation that White and William Heller and Robert Rehley, members of White's staff, conducted prior to the

Executive Life GIC purchases that were made in December of 1987 and January of 1988. Although the services of Johnson & Higgins had been terminated and another consultant had not been hired, White testified he did "nothing new" by way of research into Executive Life's finances between June and December of 1987. Heller and Rehley, when deposed, indicated that in connection with these purchases, their task was to keep current Unisys files on bidding insurers up-to-date. If, as the record suggests, Unisys' investigation consisted of nothing more than confirming that Executive Life's credit ratings had not changed since June, 1987, a reasonable factfinder could find that the investigations for the second and final GIC purchase were deficient.

Of course, the thoroughness of a fiduciary's investigation is measured not only by the actions it took in performing it, but by the facts that an adequate evaluation would have uncovered. *Fink,* 722 F.2d at 962 (Scalia, J., concurring in part and dissenting in part) ("[T]he determination of whether an investment was objectively prudent is made on the basis of what the trustee knew or *should have known;* and the latter necessarily involves consideration of what facts would have come to his attention if he had fully complied with his duty to investigate and evaluate.") (emphasis in original). In this regard, the plaintiffs presented evidence which showed that one who investigated Executive Life in 1987 and 1988 would have found, for example, that Moody's Investors Service had given Executive Life a rating which was notably lower than those assigned by Standard & Poors and A. M. Best; that the higher ratings that Executive Life had received were being questioned in some financial circles; that at least one reputable consultant had strongly recommended against investments in Executive Life annuity contracts; and that Executive Life's reinsurance practices were under scrutiny by state regulators. The record, however, does not reveal which of these items Unisys may have considered, and raises a question as to what conclusion concerning an investment in Executive Life a prudent fiduciary would have reached had they come to its attention.

Turning to the credit ratings upon which Unisys admittedly relied in large measure to make and defend its decisions to invest in Executive Life, we observe that here, too, the record raises genuine issues as to whether Unisys' reliance was justified and informed. As noted earlier, Becker advised White and his staff that a AAA rating from Standard & Poors was a valid indicator of Executive Life's economic vitality only if junk bonds did not exceed 35% of its bond portfolio. When deposed, Becker testified that Executive Life's representatives had reported in June of 1987 that the insurer met this standard; White, who was ultimately responsible for assessing Executive Life's prospects, however, was unable at his deposition to recall the percentage of the insurer's junk bond holdings at relevant times and guessed that the percentage was under "forty or fifty." This, whether White was, in fact, cognizant of this significant item of information when he decided to invest in Executive Life is for the factfinder to decide. Moreover, when Heller was asked during his deposition what he knew about the bases underlying Standard & Poors ratings, he testified to a limited understanding, stating that "[Murray Becker] was the most knowledgeable of anyone ... of the methodology of Standard & Poors. We would not have been knowledgeable in that area." Whether the rating was a reliable measure of Executive Life's financial status under the circumstances and whether Unisys was capable of using the rating effectively are, therefore, matters which must be decided at trial. *See Donovan v. Cunningham,* 716 F.2d at 1474 ("An independent appraisal is not a magic wand that fiduciaries may simply waive over a transaction to ensure that their responsibilities are fulfilled. It is a tool and like all tools, is useful only if used properly.").

When we focus on the five-year duration and interest terms of the Executive Life GIC's, we find additional issues for trial. The record is uncontroverted that, in June of 1987, Becker advised in favor of the purchase of an Executive Life GIC of only three-years duration and that White did not heed his advice as to the contract's duration; the record does not resolve, however, whether the relative merits of these different maturity dates, which could have had a significant impact on

the risk associated with the investment, were debated and to what result. Rehley recalled some discussion on the issue; Heller did not believe that such a discussion took place; and Becker could not remember whether any consideration, one way or the other, was given to the matter. We believe that if this debate did not take place, a reasonable factfinder could conclude that Unisys did not adequately deliberate its investment decision and that had it done so. It would have rejected a long-term investment in Executive Life. Moreover, that White sought to maximize interest rates by investing in the five-year GICs is not disputed; whether he inappropriately sacrificed security in making investments for Funds where the preservation of capital was of paramount concern is yet another issue for trial. The dramatic disparity between the interest rates that Executive Life offered and those offered by other successful bidders could lead a factfinder to infer that the risk accompanying Executive Life's yields was unacceptably high.

The record also raises a question as to whether Unisys was equipped to conduct GIC bids unassisted and whether the absence of written guidelines for the bidding process impeded its ability to make prudent investment decisions. As noted, when questioned about credit ratings, Heller testified that he and his colleagues lacked a certain expertise, and when questioned about the "negative consequence" of the absence of written guidelines, he testified: "[T]here was the possibility that we would be placing money with companies that would subsequently run into trouble. There was also the fear that too much money could be with any one issuer."

Finally, we note a report prepared by George M. Gottheimer, Jr., an expert retained by the plaintiffs, opining that the purchases of long-term Executive Life GICs in 1987 and 1988 were imprudent.[12] According to Mr. Gottheimer, Unisys

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12. Unisys argues that we may not consider Mr. Gottheimer's report because it was not in the form of a sworn affidavit as required by the Fed. R. Civ. P. 56(e). Unisys, however, did not move to strike nor did it otherwise object to Dr. Gottheimer's report in the district court. Indeed, Unisys placed the report in the record.

We agree with the plaintiffs and our sister courts of appeals that Rule

breached its fiduciary duties by not adequately investigating the financial condition of Executive Life, by not having guidelines against which to measure the insurer; by relying solely on the credit ratings Executive Life had received; by placing almost exclusive emphasis on yield; and by not employing the services of a consultant for all of the purchases in view of its lack of knowledge and skill. Mr. Gottheimer's opinion, based on his interpretation of the deposition testimony and exhibits he reviewed, is itself some evidence of Unisys' imprudence, capable of defeating Unisys' motion for summary judgment.

We thus conclude that in response to Unisys' motion for summary judgment, the plaintiffs raised genuine issues of material fact to support their claim that the investment of plan assets in Executive Life GICs violated section 1104(a)(1)(B)'s duty of prudence.

B.

We turn next to the plaintiffs' claim in Count I that Unisys violated ERISA's fiduciary duty set forth in 29 U.S.C. § 1104(a)(1)(C), to "diversify[] the investments in the plan so as to minimize the risk of large losses", by placing an excessive amount of plan assets in Executive Life GICs.

As a general proposition, ERISA's duty to diversify prohibits a fiduciary from investing disproportionately in a particular investment or enterprise. A Congressional Committee report on the Act's diversification provision provides:

> A fiduciary usually should not invest the whole or an unreasonably large proportion of the trust property in a single security. Ordinarily the fiduciary should not invest

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NOTES *(Continued)*

56 defects are waived where they are not raised in the district court. *See e.g., Humane Soc. of The United States v. Babbitt,* 46 F.3d 93, 96 n.5 (D.C. Cit. 1995)(Rule 56 defects are waived where motions to strike are not filed); *DeCinto v. Westchester County Medical Center,* 821 F.2d 111, 114 (2d Cir.). *cert. denied.* 4848 U.S. 965 (1987)(citing "unanimous accord" on the question in five other courts of appeals). We think this rule is especially applicable given that it was Unisys which submitted the report to the district court.

> the whole or an unduly large proportion of the trust property in one type of security or in various types of securities dependent upon the success of one enterprise or upon conditions in one locality since the effect is to increase the risk of large losses.

H.R. Conf. Rep. No. 1280, 93d Cong. 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5085.[13]

ERISA's duty to diversify is not measured by hard and fast rules or formulas. Congress has instructed that "[t]he degree of investment concentration that would violate this requirement to diversify cannot be stated as a true percentage, because a prudent fiduciary must consider the facts and circumstances of each case. The factors to be considered include (1) the purposes of the plan; (2) the amount of the plan assets; (3) financial and industrial conditions; (4) the type of investment, whether mortgages, bonds or shares of stock or otherwise; (5) distribution as to geographic location; (6) distribution as to industries; (7) the dates of maturity." *Id.* at 5085. Further, the Act's legislative history informs that a plan may invest wholly in insurance or annuity contracts, since generally an insurance company's assets are to be invested in a diversified manner. *Id.* Finally, if a plaintiff proves a failure to diversify,

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13. Section 1104(a)(1)(C) of ERISA in large part reflects the fiduciary duty set forth in the Restatement (Second) of Trusts:

> § 228. Distribution of Risk of Loss
>
> Except as otherwise provided by the terms of the trust, the trustee is under a duty to distribute the risk of loss by reasonable diversification of investments, unless under the circumstances it is prudent not to do so.
>
> * * *
>
> **Comment:**
>
> a. *Duty to diversity investments.* The trustee is under a duty to the beneficiary to exercise prudence in diversifying the investments so as to minimize the risk of large losses, and therefore he should not invest a disproportionately large part of the trust estate in a particular security or type of security. It is not enough that each of the investments is a proper investment. . . .

Restatement (Second) of Trusts, § 228, cmt. a (1959).

the burden shifts to the defendant to demonstrate that nondiversification was nonetheless prudent. *Id.* at 5084.

Before we consider the substance of the plaintiffs' failure to diversify charge and whether summary judgment was properly entered in Unisys' favor, we must determine how the duty set forth in section 1104(a)(1)(C) is measured in the context of the kind of Plans before us, which are comprised of a number of discrete funds, each with its own distinct type of investment. Not surprisingly, the parties maintain diametrically-opposed positions on the issue: Unisys argues that we must measure diversification by considering all of the investments the Plans hold, and the plaintiffs urge evaluation of diversification by considering the investments solely in the Fixed Income and Insurance Contract Funds.

Looking first to ERISA's language, we find little guidance: the Act refers only to a fiduciary's duty to diversify the "plan's" investments. 29 U.S.C. § 1104(a)(1)(C). ERISA's legislative history, however, indicates that a fiduciary's performance of the duty may be measured by the diversity it has achieved in a particular investment vehicle and, where the management of a plan's investments is distributed among several managers. In the segment of the plan for which it has responsibility. Congress stated:

> [A]lthough the fiduciary may be authorized to invest in industrial stocks, he should not invest a disproportionate amount of the plan assets in the shares of corporations engaged in a particular industry. If he is investing in mortgages on real property he should not invest a disproportionate amount of the trust in mortgages in a particular district or on a particular class of property so that a decline in property values in that district or of that class might cause a large loss.
>
> An investment manager, A, is responsible for 10% of the assets of a plan and is instructed by the named fiduciary or trustee to invest solely in bonds; another investment manager, B, is responsible for a different 10% of the assets of the same plan and instructed to invest solely in equities. . . . In these circumstances, A would invest solely

> in bonds in accordance with his instructions and would diversify the bond investments in accordance with the diversification standard, the prudent man standard, and all other provisions applicable to A as a fiduciary. Similarly, B would invest solely in equities in accordance with his instructions and these standards.

H.R. Cong. Rep. No. 1280, *reprinted in* 1974 U.S. Code Cong. & Admin. News at 5084.

In addition to Congress' direction, we believe the case of *GIW Indus., Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc.*, 895 F.2d 729, 733 (11th Cir. 1990), is instructive. There the plaintiff maintained a profit sharing plan for its employees which consisted of three funds. Plan participants allocated their respective account balances among the funds and were permitted to change their investment election or to withdraw from the plan once a year. The plaintiff hired the defendant to manage the investments of Fund A, an asset allocation account which was invested in fixed income securities, equities of publicly traded companies and money market instruments. The defendant adopted a strategy to invest Fund A assets in primarily long-term government bonds, which were highly liquid and carried a minimal credit risk. Due to a series of required cash disbursements, however, the defendant was required to sell Fund A assets at a loss. The plaintiff filed suit, alleging that, *inter alia*, the defendant breached its fiduciary duty under ERISA to diversify the Fund's investments.

On appeal from the judgment entered against it, the defendant argued that its obligations to diversify was properly measured by considering the investments of the entire plan, not merely the investments in Fund A. The court of appeals disagreed and affirmed the judgment, reasoning:

> It is undisputed, though, that [the defendant] exercised no control over any fund other than Fund A. Moreover, Fund A could not draw upon the other funds for the purpose of cash pay-outs. Even if the entire plan were to be considered in determining whether the diversification requirement has been met, [the defendant] made no investigation of the other funds, either. Mr. Burton, whose

> testimony the district court credited, declared that the existence of Fund D did not influence how [the defendant] invested the assets of Fund A.

Id. at 733.

Although the facts in this case and *GIW Industries* differ in certain respects,[14] we find the approach taken by the Court of Appeals for the Eleventh Circuit applicable, persuasive, and in keeping with Congress' intent in section 1104(a)(1)(C). Here, as there, Unisys was responsible for investing a portion of the Plans' assets in designated investments. Similarly, the Investment that other managers made for the Plans in other investment areas had no bearing on the investment choices Unisys made for the Funds it managed. Moreover, plan-wide investments were not available (and it would appear could not be available) to offset losses sustained by the Fixed Income and Insurance Contract Funds as a result of Executive Life's failure. Thus, the risk of loss which section 1104(a)(1)(C) aims to minimize was not distributed among the Plans' total holdings; it was, instead, spread only among the GIC Funds' contracts. We, therefore, conclude that under these circumstances, Unisys' satisfaction of the duty to diversify is properly assessed by examining the concentration of Executive Life investments in the Fixed Income and Insurance Contract Funds.

Because the record is incomplete in critical respects, however, we cannot determine whether Unisys is entitled to summary judgment on this aspect of the plaintiffs' case. For example, as the record does not reveal the rationale for Unisys' rule not to place more than 20% of GIC Fund assets with a single issuer, the process by which Unisys may have applied the rule to the GIC purchases at issue, or the analysis that

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14. We note that the fund at issue in *GIW Indus., Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc.*, 895 F.2d 729 (11th Cir. 1990), in contrast to the GIC Funds here, was, by definition, to include a variety of investment types — fixed income securities, equities of publicly traded companies and money market instruments. *Id.* at 730. Thus, it would seem that the defendant's investment strategy — to invest primarily in long-term bonds — violated the funds inherent diversification requirement. In our view, this fact difference is not significant to our analysis.

Unisys may have undertaken of the factors Congress has directed prudent fiduciaries to consider, we cannot decide whether reasonable minds could differ as to the adequacy of Unisys' actions with regard to diversification. We are also left to ponder how Unisys attempted to maintain a steady degree of diversification where due to the reinvestment of proceeds from the Fixed Income into the Insurance Contract Fund, the percentage of assets in Executive Life contracts in each Fund changed over time or why, as White testified, Unisys assessed diversification according to the Funds' aggregate exposure to Executive Life, and not according to the exposure in each Fund.[15] Moreover, assuming that the concentration of assets placed with Executive Life in the Fixed Income or the Insurance Contract Fund was excessive, the record does not reveal whether, as section 1104(a)(1)(C) permits, there may have been special circumstances excusing Unisys from diversifying GICs. Finally, by its terms, ERISA requires a fiduciary to diversify so as to avoid "large losses". Because the amount of losses the Fixed Income and Insurance Contract Funds will ultimately suffer has remained uncertain, the district court stayed discovery on the issue of damages; the summary judgment materials submitted to the district court by the parties were, by order, limited to liability issues. We further understand that discovery on damages issues proceeded after Unisys' summary judgment motion was filed. Obviously, whether "large losses" were avoided and in turn, whether Unisys satisfied its burden on summary judgment as to the duty to diversify, cannot be determined on the record before us.

We, therefore, conclude that Unisys' request for summary judgment in its favor on the plaintiffs' section 1104(a)(1)(C) failure to diversity claim was premature. Upon remand, the record may be developed and a motion for summary judgment may be judged on the basis of the principles we have set forth.

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15. In December of 1988, the record shows that 21.7% of the Fixed Income Fund and 19.18% of the Insurance Contract Fund were invested in Executive Life; as of March 31, 1991, shortly before the plaintiffs' account balances were frozen, 30% of the Fixed Income Fund and 7% of the Insurance Contract Fund were invested in the insurer, with exposure on an aggregate basis at about 15%.

C.

We now turn our attention to the plaintiffs' claim in Count I that Unisys breached section 1104(a)'s fiduciary duty to disclose. As we understand it, the plaintiff's claim is that Unisys misrepresented the risks associated with investing monies in the Fixed Income and Insurance Contract Funds through misleading or incomplete communications regarding the Funds' portfolio once the Executive Life GICs had been purchased, as well as Executive Life's financial condition in 1990. In view of the district court's ruling that Unisys' disclosure obligations are defined solely by section 1104(c), the threshold issue we must consider is whether the plaintiffs' claim under section 1104(a) may continue.

Looking for guidance to our cases regarding ERISA's fiduciary duty to inform, we note that we have repeatedly held that a fiduciary may not materially mislead those to whom section 1104(a)'s duties of loyalty and prudence are owed. *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation,* 57 F.3d 1255, 1261 (3d Cir. 1995); *Curcio v. John Hancock Mut. Life Ins. Co.,* 33 F.3d 226, 238 (3d Cir. 1994); *Bixler v. Central Pennsylvania Teamsters Health and Welfare Plan,* 12 F.3d 1292, 1300 (3d Cir. 1994); *Fisher v. Philadelphia Elec. Co.,* 994 F.2d 130, 135 (3d Cir.), *cert. denied,* ___ U.S. ___, 114 S.Ct. 622 (1993). Thus, in *Fisher,* where the plaintiffs alleged that the defendant misrepresented its intention to establish a "retirement sweetener", we held that under section 1104(a) "[a] plan administrator may not make affirmative material misrepresentations to plan participants when asked about changes to an employee pension benefit plan. Put simply, when a plan administrator speaks, it must speak truthfully." 994 F.2d at 135. We also concluded that a misrepresentation was "material" if there was a "substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire." *Id.* Because the content of the communications at issue and whether such communications constituted affirmative, material misrepresentations were questions of fact, we reversed the summary judgment that had been entered for the defendant and remanded the case for trial. *Id.*

Shortly thereafter, in *Bixler v. Central Pennsylvania Teamsters Health and Welfare Fund,* 12 F.3d 1292 (3d Cir. 1994), where the plaintiff claimed that her deceased husband's employer had engaged in repeated misrepresentations that prevented her from electing to continue medical coverage under COBRA, we considered "to what extent a fiduciary's alleged misinformation or failure to provide relevant information constitutes a breach of fiduciary duty under §[11]04(a)." *Id.* at 1300. Guided by, *inter alia*, section 173 of the Restatement (Second) of Trusts,[16] we concluded that "[the] duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful." *Id.* We acknowledged that "the duty recognizes the disparity of training and knowledge that potentially exists between a lay beneficiary and a trained fiduciary[]", and we further conclude that "the fiduciary's obligations will not be excused merely because [the beneficiary] failed to comprehend or ask about a technical aspect of the plan." *Id.* Finding evidence from which a trier of fact could have inferred that the employer knew that the plaintiff was left with substantial unpaid medical expenses and that she could have received reimbursement from those expenses under the employer's plan by signing and returning the COBRA notice her husband received, we viewed the employer's failure to advise the plaintiff of COBRA coverage as a potential breach of fiduciary duty. This was so even though the plaintiff contacted the employer while the COBRA election period was open and inquired only about

16. Under the Restatement (Second) of Trusts:

> d. *Duty in the absence of a request by the beneficiary.* Even if the trustee is not dealing with the beneficiary or the trustee's own account, he is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person.

Restatement (Second) of Trusts § 183, cmt. d, *cited in, Bixler v. Central Pennsylvania Teamsters Health and Welfare Fund,* 12 F.3d 1292, 1300 (3d Cir. 1994).

the availability of death benefits. *Id.* at 1302. Thus, we held: "[I]f indeed [the employer] was acting in a fiduciary capacity, it acted under a duty to convey complete and accurate information that was material to [the plaintiff's] circumstance. Her circumstance was clearly broader than her inquiry". *Id.* at 1302-03. Reversing the grant of summary judgment for the defendant and remanding, we instructed the district court to determine whether "material information" may have included more than the mere fact that the [employer] did not offer life insurance . . . ." *Id.* at 1303.

Most recently, *In re: Unisys Corp. Retiree Medical Benefit "ERISA" Litigation,* 57 F.3d 1255 (3d Cir. 1995), we reaffirmed that an ERISA fiduciary has a duty under section 1104(a) to convey complete and accurate information when it speaks to participants and beneficiaries regarding plan benefits. There retired employees were informed by summary plan descriptions and company representatives that they had lifetime medical benefits. Nonetheless, relying on a reservation of rights clause in the plans that gave it the right to terminate "at any time" or for "any reason", the company announced its decision to terminate all existing medical benefits plans and replace them with a new plan that altered post-retirement medical benefits in substantial measure. The retirees filed a class action against the company, asserting, *inter alia*, that the company breached its fiduciary duty under ERISA by affirmatively misleading plan participants about the duration of their retiree medical benefits. Noting that our prior decisions "firmly establish that when a plan administrator affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries", *Id.* at 1264, we upheld the district court's decision to permit the plaintiffs' breach of fiduciary duty claim to proceed where the evidence established "that the [defendant] company actively misinformed its employees by affirmatively representing to them that their medical benefits were guaranteed once they retired, when in fact the company knew this was not true

and that employees were making important retirement decision relying upon this information . . . ." *Id.* at 1266-67.[17]

Contrary to the district court's ruling, we believe these principles may apply in the instant case, even if the Plans fall within the purview of 29 U.S.C. § 1104(c). By its terms, section 1104(c) relieves fiduciaries of liability for breaches of fiduciary duty which result from a participant's or a beneficiary's exercise of control; it does not define nor does it relieve fiduciaries of section 1104(a)'s duties in the first instance. Therefore, the question we face at this juncture is not whether section 1104(c), even assuming it applies, exempts Unisys from section 1104(a)'s disclosure duty; it is whether the duty as we have defined it extends to the circumstances presented in this case. Although our prior decisions concerned allegations of material misrepresentations relating to the terms of a plan or the benefits to which participants or beneficiaries were entitled, we hold that their underlying rationale applies with the same force here. We can discern no reason why our admonitions that "when a [fiduciary] speaks, it must speak truthfully[]" *Fisher,* 994 F.2d at 135, and when it communicates with plan participants and beneficiaries it must "convey complete and accurate information that [is] material to [their] circumstances[]", *Bixler,* 12 F.3d at 1302-03, should not apply to alleged material misrepresentations made by fiduciaries to participants regarding the risks attendant to a fund investment, where, as here, the participants were charged with directing the investment of their contributions among the Plans' various funds and the benefits they were ultimately provided depended on the performance of their investment choices. We also hold that in this context, a misrepresentation is "material" if there was a substantial likelihood that it would have misled a reasonable participant in making an adequately

17. In *In Re: Unisys Corp. Retiree Medical Benefit "ERISA" Litigation,* 57 F.3d 1255 (3d Cir. 1995), we also reaffirmed our conclusion in *Bixler,* 12 F.3d at 1298, that under section 1132(a)(3) of ERISA, equitable relief is available to an individual harmed by a breach of fiduciary duty. 57 F.3d at 1266-69. The issue of relief is not raised in this appeal.

informed decision about whether to place or maintain monies in the Fixed Income and/or Insurance Contract Funds. *See Fisher,* 994 F.2d at 135.

It is important to note what we have not decided. As the uncontroverted record reveals that Unisys elected and indeed intended to communicate with participants about the risks accompanying investments in the Fixed Income and Insurance Contract Funds and Executive Life's financial condition in 1990,[18] we have not determined whether Unisys had a duty under section 1104(a) to communicate anything at all to the Plan's participants about these matters in the first place. We also note that we do not view the plaintiffs as claiming, nor do we hold, that Unisys was obligated to give investment advice, to opine on Executive Life's financial condition or to predict Executive Life's eventual demise. *See Id.* at 135 (citations omitted) ("[W]e hasten to add that ERISA does not impose a 'duty of clairvoyance' on fiduciaries.").

Turning our attention to the record, we find a number of triable issues. Clearly there is evidence of several communications made by Unisys to plan participants on an individual, group or systematic basis regarding the nature of and risks associates with investments in the Fixed Income and Insurance Contract Funds and Executive Life's downturn.[19] Whether the communications constituted misrepresentations and whether they were material under the principles we have articulated are questions of fact that are properly left for trial. *Id.* at 135. *See Curcio,* 33 F.3d at 236 (holding that misleading summary

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18. Unisys does not dispute that it made disclosures to participants, and describes the information it disseminated as intended to disclose the "nature of the [Plan's Executive Life holdings] and the attendant risks" and the "developments surrounding Executive Life . . . ." (See Memorandum in Support of Defendants' Motion for Summary Judgment and to Strike Jury Demand, pp. 17, 24). As in the district court, on appeal Unisys discusses the adequacy of its disclosure only in terms of section 1104(c).

19. For the first time on appeal Unisys asserts that the plaintiffs "have submitted no cognizable proof of detrimental reliance." Because Unisys did not proffer this issue in the district court, we decline to address it. See *Selected Risks Ins. Co. v. Bruno,* 718 F.2d 67, 69 (3d Cir. 1983) (federal appellate court generally does not consider issues not raised in the district court).

plan description coupled with misrepresentations in an audiotape and a pamphlet supported a claim for breach of fiduciary duty). At this point, we observe that what was stated, as well as what was left unstated, by Unisys in its communications to plan participants is relevant. In our view, while Unisys was not obligated to share with participants everything it knew about GICs and Executive Life, it was obligated to impart to participants material information of which it had knowledge that was sufficient to apprise the average plan participant of the risks associated with investing in the Fixed Income and Insurance Contract Funds in view of the purchases of the Executive Life GICs and the financial condition Executive Life presented in 1990. Moreover, in this regard, we do not, as Unisys urges, distinguish between "public" and "non-public" information or do we limit Unisys' duty to disclose the latter. We do not see any reason under the circumstances for doing so, and at any rate, Unisys include public data, (credit ratings, for example), in its communications to plan participants.

Accordingly, we conclude that the plaintiffs raise genuine issues of material facts on their section 1104(a) failure to disclose claim.

IV.

Lastly, we address Unisys' assertion that section 1104(c) of the Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. §1001 *et seq.* (1985 & Supp. 1995), applies in this case.

Generally speaking, ERISA holds fiduciaries who commit breaches of duty liable for resulting losses. 29 U.S.C. § 1109.[20]

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20. Section 1109 of the Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. §1001 *et seq.* (1985 & Supp. 1995), states in pertinent part:

> **§ 1109. Liability for breach of fiduciary duty**
>
> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach ....

29 U.S.C. §1109(a).

Under section 1104(c) of the Act, however, a fiduciary is not liable for any loss or breach which results from a participant's exercise of control over the assets in his or her individual account. Moreover, a participant who exercises such control is not deemed a fiduciary. Section 1104(c) states:

> §1104. Fiduciary Breaches
>
> (c) Control over assets by participant or beneficiary
>
> In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—[21]

---

21. Recognizing that "there may be difficulties in determining whether the participant in fact exercises control over his account[.]" Congress directed that "whether participants and beneficiaries exercise independent control is to be determined pursuant to regulations prescribed by the Secretary of Labor". H.R. Conf. Rep. No. 1280, 93d Cong., 2nd Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5086.

The Secretary of Labor issued a final regulation for 29 U.S.C. § 1104(c) in October, 1992. 29 C.F.R. § 2550.404c-1. The regulation sets forth in considerable detail the "kinds of plans that are 'ERISA section [1104(c)] plans,' the circumstances in which a participant or beneficiary is considered to have exercised independent control over the assets in his account as contemplated by section [1104(c)], and the consequences of a participant's or beneficiary's exercise of control." *Id.* §2550.404c-1(a).

Briefly, under the regulation, a plan must inform participants or beneficiaries that the plan is intended to constitute a plan described in section 1104(c) of ERISA and Title 29 of the Code of Federal Regulations and that "the fiduciaries of the plan may be relieved of liability for any losses which are the direct and necessary result of investment instructions given by such participant or beneficiary." *Id.* § 2550.404c- 1(b)(2)(1)(i). The plan must also allow participants the opportunity to choose from a broad range of investment alternatives, give investment instruction with appropriate frequency, diversify investments, and obtain sufficient information to make informed investment decisions. *Id.* § 2250.404c-1(a)-(c).

Generally, the regulation "is effective with respect to transactions occurring on or after the first day of the second plan year beginning on or after October 13, 1992." *Id.* § 2550.404c-1(g)(1). Transactions occurring before this date are governed by section 1104(c) of the Act without regard to the regulation. *Id.* § 2550.404c-1(g)(3).

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

29 U.S.C. § 1104(c) (footnote added).

Finding that the Plans gave the plaintiffs the authority to determine into which Funds their respective contributions were directed and that Unisys advised them of the "non-guaranteed" nature of the investments in the Fixed Income and Insurance Contract Funds, the district court held that the plaintiffs had "control" over their assets under section 1104(c) and that, therefore, Unisys was freed from section 1104(a)'s disclosure duties. Because the court concluded that Unisys was entitled to summary judgment on the plaintiffs' breach of fiduciary duty claims, it did not reach Unisys' assertion that section 1104(c) applies to relieve it of liability for the plaintiffs' alleged losses. We have already determined that the court erred in granting summary judgment to Unisys on the plaintiffs' breach of fiduciary duty claims and in using section 1104(c) to excuse Unisys from the duty to inform that ERISA imposes upon fiduciaries. We must now determine whether the district court's decision to grant Unisys summary judgment should nonetheless be affirmed because Unisys urges that section 1104(c) provides it with a complete defense to the plaintiffs' claims.

Our task in interpreting section 1104(c) and applying it here is, of course, to effectuate Congress' intent. *Negonsott v. Samuels*, ___ U.S. ___, 113 S.Ct. 1119, 1122-23 (1993). As with any inquiry of statutory construction, we start with the text of the statute, *Pension Benefit Guar. Corp. v. White Consolidated Indus., Inc.*, 998 F.2d 1192, 1198 (3d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 687 (1994); "where [Congress'] will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Griffin v. Oceanic Con-*

As the regulation was not in effect when the transaction at issue occurred, it does not apply or guide our analysis in this case.

tractors, Inc., 458 U.S. 564, 570 (1982). If the statutory language is unclear, we then look to the Act's legislative history. *Blum v. Stenson*, 465 U.S. 886, 896 (1984).

It is Unisys' position that even if it failed to satisfy ERISA's duties of prudence and diversification in the first instance by purchasing the Executive Life GICs for the Plans, the losses allegedly sustained in this case resulted from the "control" each plaintiff as a plan participant exercised — the decision to invest in Executive Life by making an informed choice to contribute to and maintain assets in the Fixed Income and Insurance Contract Funds. The plaintiffs' control, according to Unisys, emanated from two sources: the information Unisys distributed to plan participants regarding the personal responsibility they assumed for investment decisions, the nature of investments in the Fixed Income and Insurance Contract Funds in general and the Funds' holdings in Executive Life in particular,[22] as well as the Plans' contribution and transfer terms, which allowed each participant the freedom to allocate his or her assets among the various investment funds as he or she saw fit.

Given Unisys' position, the first question we must answer regarding section 1104(c) is whether the statute allows a fiduciary, who is shown to have committed a breach of duty in making an investment decision, to argue that despite the breach, it may not be held liable because the alleged loss resulted from a participant's exercise of control. In light of section 1104(c)'s plain language, we believe that it does. There

22. The information which Unisys contends is a source of the plaintiffs' control includes representations that the plaintiffs allege were materially misleading in violation of section 1104(a)'s fiduciary duty to disclose. Obviously, given the role these representations play in Unisys' section 1104(c) defense, Unisys cannot claim that section 1104(c) would relieve it from liability in the event that the representations are found to constitute breaches of ERISA's disclosure duties. It is also obvious that in the event these representations are found to have materially misled the plaintiffs, Unisys' theory of control under section 1104(c) would fail. Indeed, the parties do not dispute that accurate and complete information regarding the investments Unisys made for Fixed Income and Insurance Contract Funds is essential to the section 1104(c) control Unisys contends the plaintiffs exercised in this case.

is nothing in section 1104(c) which suggests that a breach on the part of a fiduciary bars it from asserting section 1104(c)'s application. On the contrary, the statute's unqualified instruction that a fiduciary is excused from liability for "any loss" which "results from [a] participant's or [a] beneficiary's exercise of control"[23] clearly indicates that a fiduciary may call upon section 1104(c)'s protection where a causal nexus between a participant's or a beneficiary's exercise of control and the claimed loss is demonstrated. This requisite causal connection is, in our view, established with proof that a participant's or a beneficiary's control was a cause-in-fact, as well as a substantial contributing factor in bringing about the loss incurred. *See Willett v. Blue Cross and Blue Shield of Alabama,* 953 F.2d 1335, 1343 (11th Cir. 1992) ("Section [1109] of ERISA establishes that an action exists to recover losses that 'resulted' from the breach of fiduciary duty; thus the statute does require that the breach of the fiduciary duty be the proximate cause of the losses claimed . . . ."); *Brandt v. Grounds,* 687 F.2d 895, 898 (7th Cir. 1982) (Under 29 U.S.C. § 1109, where "a fiduciary . . . who . . . breaches . . . shall be personally liable to make good . . . any losses resulting from each such breach," a causal connection is required between the breach of the fiduciary duty and the losses alleged.).

Section 1104(c)'s test, however, neither defines nor clarifies its central element — the "control" a pension plan may permit a participant or a beneficiary to exercise. 29 U.S.C. § 1104(c). Accordingly, we look to ERISA's legislative history for assistance. From a House Conference Report, we learn that section 1104(c) established a "special rule" for plans which allow a participant or a beneficiary "independent control" over individual account assets:

> *Certain individual account plans.* [A] special rule is provided for individual account plans where the participant is permitted to, and in fact does, exercise independent control over the assets in his individual account. In

23. In this regard, section 1104(c) operates in alternative circumstances, excusing a fiduciary from liability for "any loss" or "by reason of any breach" which "results from [a] participant's or [a] beneficiary's exercise of control." 29 U.S.C. § 1104(c).

> this case, the individual is not to be regarded as a fiduciary and other persons who are fiduciaries with respect to the plan are not to be liable for any loss that results from the exercise and control by the participant or beneficiary.

H.R. Conf. Rep. No. 1280, *reprinted in* 1974 U.S. Code Cong. & Admin. News at 5085-86.

From that same Report, we further learn that Congress conceptualized control in terms of authority on the part of a participant or a beneficiary to issue investment instructions to a fiduciary:

> Therefore, if the participant instructs the plan trustee to invest the full balance of his account in, *e.g.*, a single stock, the trustee is not be liable for any loss because of a failure to diversify or because the investment does not meet the prudent man standards. However, the investment must not contradict the terms of the plan, and if the plan on its face prohibits such investments, the trustee could not follow the instructions and avoid liability.

Id. at 5086.

Finally, the Report tells us that a section 1104(c) plan must offer a "broad range of investments." *Id.*[24]

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24. In accordance with Congress' direction that we consult the common law of trusts for additional insight into ERISA's provisions, we note that a trustee may under certain circumstances be discharged from liability for losses that arise out of a particular transaction which represents a breach of trust. According to sections 216, 217 and 218 of the Restatement (Second) of Trusts respectively, where a beneficiary consents to, subsequently affirms or releases a trustee's breach of trust, he cannot thereafter hold the trustee liable for losses, unless at the time of consent, affirmance or release, the beneficiary was incompetent, not informed by the trustee of his rights and the material facts, subjected to the trustee's improper influence or made party by an interested trustee to an unfair or unreasonable bargain. Restatement (Second) of Trusts, §§ 216, 217, 218 (1959). In addition, under section 219 of the Restatement, a beneficiary may be barred from holding a trustee liable for losses by laches. *Id.* § 219.

We have not found, however, a common law trust principle that is analogous to the scheme that Congress established in 29 U.S.C. § 1104(c) as we understand it.

Before we turn to section 1104(c)'s application to the evidence in this case, we have several observations to make. First, our analysis of the statute and Congress' statements of legislative intent lead us to believe that while all plans which qualify under section 1104(c) have certain elements in common, each section 1104(c) plan is unique, depending on the control a plan permits participants and beneficiaries to exercise by way of the investment instructions they may give. Second, because section 1104(c) speaks in terms of a *plan* which permits control to a participant or a beneficiary, a participant's or a beneficiary's control under section 1104(c) stems from a plan's specific provisions, not from elements which lie outside the plan's structure and which may arguably amount to control in connection with a single transaction. Finally, section 1104(c) is akin to an exemption from or a defense to ERISA's general rule, relieving fiduciaries in the appropriate circumstances of the liability to which they would otherwise be exposed under 29 U.S.C. § 1109. Accordingly, a fiduciary which seeks section 1104(c)'s protection bears the burden of showing its application. *See Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1215 (2d Cir. 1987) (holding that the defendant is in the best position to prove and should bear the burden of establishing its entitlement to an exemption under 29 U.S.C. § 1108 from 29 U.S.C. § 1106(b), ERISA's prohibited transaction provision); *Donovan v. Cunningham*, 716 F.2d 1455, 1467-68 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) (ESOP fiduciaries charged with violations of section 1104(a)'s duty of prudence bear the burden of proving the "statutory defense" of adequate consideration under 29 U.S.C. § 1108(e)).

Having carefully reviewed the record with this background in mind, we conclude that Unisys is not entitled to summary judgment on its section 1104(c) defense. The record is inadequately developed as to critical facts and demonstrates the existence of disputed material facts as to whether the Plans fall within the statute's coverage.

Starting with Congress' mandate that a section 1104(c) plan provide "a broad range of investments," we look to see whether the uncontroverted evidence Unisys submitted establishes that the Plans gave participants a wide array of invest-

ments with materially different risk and return characteristics. Given Unisys' theory of control, we also look to see whether the evidence establishes that a participant could remove his or her assets from, in this instance, the Fixed Income or Insurance Contract Funds and place them in a comparable investment vehicle. In our view, if the Plans did not offer an acceptable alternative to GIC investments, a participant did not have the freedom and, in turn, the control to decide how his or her assets were ultimately invested. In this regard, we find the evidence lacking. The record includes documents which give a general description of the six funds the Plans offered; it does not, however, include evidence sufficient to measure the breadth of actual plan investments or assess all of the investment alternatives available to participants.

As stated, Unisys' contention that the plaintiffs were permitted control under section 1104(c) and indeed exercised it is premised, in part, on the information Unisys allegedly disseminated to participants regarding "his or her investment options[,] [his or her] obligation to manage his or her own investments[,] the risks associated with th[e] election to invest in GICs[,] and developments surrounding Executive Life . . . ." (See Defendants' Memorandum of Law in Support of their Motion for Summary Judgment and to Strike Jury Demand, pp. 15-17). We agree that information, both general and relating specifically to Executive Life, is an essential element of Unisys' section 1104(c) theory that the plaintiffs themselves ultimately controlled whether their respective assets were invested in Executive Life GICs, even though Unisys chose the investment in the first place. For Unisys to prevail under section 1104(c), however, it must establish that the Plans provided information sufficient for the average participant to understand and assess: the control the Plans permitted a participant to exercise and the financial consequences he or she assumed by exercising that control; the rights that ERISA provided to participants and the obligations that the Act imposed upon fiduciaries; the Plans' terms and operating procedures; the alternative funds the Plans offered; the investments in which assets in each fund were placed; the financial

condition and performance of the investments; and developments which materially affected the financial status of the investments.

Based on our careful review of the record, we find that Unisys has not satisfied its burden on summary judgment to show that this necessary information was provided to the Plans' participants. Significantly, the written documents which establish and maintain the Plans are conspicuously missing from the record. Thus, we cannot determine what information the Plans made available to participants as a matter of course. If Unisys' dissemination of the information it relies upon to assert section 1104(c)'s application in this case was not performed pursuant to a plan term but was merely situational, an isolated response to a crisis in one investment, then the control that Unisys contends the plaintiffs had was not permitted by the Plans as section 1104(c) requires and the statute's relief would be unavailable. As for the disclosures that Unisys included in the record, whether they communicated to the average participant the information we have decided is critical to Unisys' section 1104(c) defense are questions of fact properly left to the factfinder to decide at trial.

Moving to the second component of Unisys' position regarding the plaintiffs' control — the Plans' contribution and transfer terms — we agree with Unisys that the evidence is uncontroverted that for all intents and purposes, a participant's ability to make initial contributions to the Plans' various investment funds was unfettered. The transfer restrictions that the Plans imposed upon participants, however, are problematic. The record reveals that the Plans restricted transfers which involved all of the GIC Funds and the Short-Term Investment Fund in order to obtain higher interest rates from GIC issuers.[25] While we have no quarrel with the reason for the transfer restrictions or with the notion that the frequency with which a participant issues investment instructions may be

25. Charles Service, a member of Unisys Corporation's Capital Management Trust Investment Department explained: "These restrictions allow the insurance companies to forecast their cash flows with greater certainty, thereby reducing their risk. With their risk reduced, the insurance companies which bid for our GICs can offer significantly higher yields."

restricted without necessarily eliminating the control that section 1104(c) contemplates, we believe that a reasonable factfinder could conclude that the duration and pervasiveness of the restrictions imposed upon participants by the Plans so significantly limited their ability to decide in which Funds their respective assets were allocated, that the restrictions are antithetical to the concept of "independent control" that Congress enacted in section 1104(c). Moreover, assuming that control existed at the Plans' inception, the factfinder could conclude that when Unisys agreed on October 17, 1990, to give Executive Life the right under certain circumstances "to not honor employee requests for withdrawal" in exchange for Executive Life's consent to a reduction in the waiting period for asset transfers between "non-competing" funds and the GIC Funds, control within the meaning of section 1104(c) was no longer available to the participants under the Plans from that point forward.

Thus, we conclude that Unisys is not entitled to summary judgment on its section 1104(c) defense to the plaintiffs' breach of fiduciary duty claims.

Finally, we observe that in the event the plaintiffs prove that Unisys breached section 1104(a)'s duty of prudence and/or duty of diversification and Unisys proves that section 1104(c) applies as a defense, the losses for which Unisys would not be liable are those which, as to each plaintiff, occurred after he or she, free under the Plans' transfer terms to place the assets in any of the Plans' investment vehicles, exercised control by making the informed decision to contribute to and/or maintain assets in the Fixed Income Fund or the Insurance Contract Fund.

V.

For the foregoing reasons, we will vacate the district court's order of January 25, 1995 granting summary judgment to the defendants on Count I of the second amended consolidated class action complaint and remand for further proceedings on the plaintiffs' breach of fiduciary claims under section 1104(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1101 *et seq.* (1985 & Supp. 1995).

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-1156, 95-1157 and 95-1186

IN RE: UNISYS SAVINGS PLAN LITIGATION

JOHN P. MEINHARDT, on behalf of himself and all others similarly situated

v.

UNISYS CORPORATION
(D.C. Civil No. 91-cv-03067)

MICHAEL HECK; JOSEPH MCCARTHY; ANGELO DEPIETRO, on behalf of themselves and all others similarly situated

v.

UNISYS CORPORATION; THE ADMINISTRATIVE COMMITTEE OF THE UNISYS SAVINGS PLAN; THE INVESTMENT COMMITTEE OF THE UNISYS SAVINGS PLAN; JACK A. BLAINE; JOHN J. LOUGHLIN; KENNETH MILLER; DAVID A. WHITE; STEFAN RIESENFELD
(D.C. Civil No. 91-cv-33276)

GARY VALA, individually and on behalf of all others similarly situated

v.

JACK A. BLAINE; MICHAEL R. LOSEY; KENNETH L. MILLER; STEFAN C. RIESENFELD; CURTIS A. HESSLER; DAVID A. WHITE; UNISYS CORPORATION; THE NORTHERN TRUST COMPANY
(D.C. Civil No. 91-03278)

CAROLYN A. GOHLIKE, on behalf of herself and all others similarly situated

v.

UNISYS CORPORATION
(D.C. Civil No. 91-cv-03321)

DENNIS C. STANGA; JAMES M. COLLINS, on behalf of themselves and all others similarly situated

v.

UNISYS CORPORATION
(D.C. Civil No. 91-cv-04689)

JOHN H. BURGESS, JR., on behalf of himself and all others similarly situated

v.

UNISYS CORPORATION
(D.C. Civil No. 91-cv-04696)

John M. Meinhardt, Michael Heck, Joseph McCarthy, Angelo DiPietro, Gary Vala, Carolyn Gohlike, Dennis C. Stanga, James M. Collins and John H. Burgess, Jr.,
Appellants in No. 95-1156

IN RE: UNISYS SAVINGS PLAN LITIGATION

JOHN P. MEINHARDT, on behalf of himself and all others similarly situated

v.

UNISYS CORPORATION
(D.C. Civil No. 91-cv-03067)

BERNARD MCDEVITT, on behalf of himself and all others similarly situated

v.

UNISYS CORPORATION
(D.C. Civil No. 91-cv-03126)

PARKER C. KEAN, on behalf of himself and all others similarly situated

v.

UNISYS CORPORATION
(D.C. Civil No. 91-cv-03164)

NADIA F. SOS; FAROUK M. SOS, individually and on behalf of all others similarly situated

v.

UNISYS CORPORATION
(D.C. Civil No. 91-cv-03582)

KENNETH GOERS; JOHN J. CIESLICKI, on behalf of themselves and all others similarly situated

v.

UNISYS CORPORATION; THE NORTHERN TRUST COMPANY
(D.C. Civil No. 91-cv-04678)

WILLIAM TORKILDSON

v.

UNISYS CORPORATION
(D.C. Civil No. 91-cv-04754)

Bernard McDevitt, Parker Kean, Nadia F. Sos, Farouk M. Sos, Kenneth Goers, John J. Cieslicki and William Torkildson,
Appellants in No. 95-1157

IN RE: UNISYS SAVINGS PLAN LITIGATION

JOHN P. MEINHARDT, on behalf of himself and all others similarly situated

v.

UNISYS CORPORATION
(D.C. Civil No. 91-cv-03067)

HENRY ZYLLA; RICHARD SILVER; RONALD GRIPPO; EDWARD LAWLER; RICHARD ANDUJAR; CLARENCE MULLER; CHARLES WAHLER; JAMES MCLAUGHLIN; DONALD RADER; JOSEPH LAO; JAMES GANGALE; ALFRED CONTARINO; RICHARD COLBY; JOHN MARCUCCI; JOSEPH FIORE; RICHARD MASTRODOMENICO; NICK KLEMENZ; PETER SZCZYBEK, on behalf of themselves and all others similarly situated; ENGINEERS ONION LOCAL 444 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCALS 445 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCALS 450 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCALS 470 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCALS 165 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, A.F.L.- C.I.O.

v.

UNISYS CORPORATION; EDWIN P. GILBERT; JOHN J. LOUGHLIN; THOMAS PENHALE, individually and in their capacities as members of the Unisys Employee Benefits Executive Committee and administrators of the Unisys Retirement Investment Plan; RICHARD H. BIERLY; CURTIS A. HESSLER; LEON J. LEVEL; KENNETH L. MILLER; DAVID A. WHITE; JACK A. BLAINE; STEFAN C. RIESENFELD; GEORGE T. ROBSON, individually and in their capacities as members of the Investment Committee of the Unisys Retirement Investment Plan

(D.C. Civil No. 91-cv-03772)

Henry Zylla, Richard Silver, Ronald Grippo, Edward Lawler, Richard Andujar, Clarence Muller, Charles Wahler, James McLaughlin, Donald Rader, Joseph Lau, James Gangale, Alfred Contarino, Richard Colby, John Marcucci, Joseph Fiore, Richard Mastrodomenico, Nick Klemenz and Peter Szczybek, individually and on behalf of the class certified,

Appellants in No. 95-1186

Appeal from the United States District Court for the Eastern District of Pennsylvania

---

Present: Mansmann, Scirica and Nygaard, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on September 13, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered on January 26, 1995, be, and the same is hereby vacated and the causes are remanded to the District Court for further proceedings on plaintiffs' breach of fiduciary claims under section 1104(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1985 & Supp. 1995). All of the above in accordance with the opinion of this Court.

ATTEST:

/s/

Clerk

Dated: January 4, 1996

Certified a true copy and issued in lieu of a formal date on February 14, 1996

Teste: /s/

Clerk, United States Court of Appeals for the Third Circuit

Service List

In Re: Unisys

Nos. 95-1156/1157/1186

(James R. Malone, Jr., Esq.
(Michael D. Gottsch, Esq.

(Joel C. Meredith Esq.
(Daniel B. Allanoff, Esq.

(James I. Wasserman, Esq.
(Julian R. Birnbaum, Esq.

Laurence Z. Shiekman, Esq.

Joseph A. Teklits, Esq.

Marcia E. Bove, Esq.

Mary Ellen Signorille, Esq.

Robert N. Eccles, Esq.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE UNISYS SAVINGS PLAN LITIGATION	:	MASTER FILE
THIS DOCUMENT RELATES TO ALL ACTIONS	:	NO. 91-3067

MEMORANDUM AND ORDER

HUTTON, J. January 25, 1995

Presently before the Court are defendants' Motion for Summary Judgment and to Strike Jury Demand, plaintiffs' Opposition to defendants' Motion, and Union plaintiffs' Opposition to defendants' Motion.

I. BACKGROUND

The plaintiffs in the instant class action are various classes of Unisys employees who participated in Unisys' retirement investment plans. They claim that the managers of those plans, breached their fiduciary duties and violated various federal regulations by investing in Guaranteed Investment Contracts ("GIC") issued by Executive Life Insurance Company ("Executive Life"), a company which was placed in conservatorship by the California Insurance Commissioner.

The plan that Unisys maintains is not a pension plan, it is a savings plan. There is no requirement that employees participate in the plan. The plan is a tax advantage savings vehicle made available to the employees of the company. None of the funds by the terms of the plan were guaranteed by the company. Pursuant to this plan, employees could get the benefit of tax-free appreciation and upon retirement, assuming the investments performed as anticipated, supplement the regular Unisys' pension plan.

The plaintiffs raise three challenges to the conduct of the company. The first is a breach of fiduciary duty under ERISA. The second is a breach of duty to make adequate disclosures

so that the participants can make the appropriate investment choices. The third is a claim under 301 of the Labor Management Reporting and Disclosure Act.

Defendants now seek summary judgment as to all the counts of the Second Amended Complaint. First, they argue that Unisys is not liable to the plaintiffs under ERISA § 404(c) because the plaintiffs had adequate information with which to make informed investment choices and controlled those investments themselves. Second, Unisys claims not to have breached any fiduciary duty established by ERISA § 404(c). Finally, Unisys argues that the Union plaintiffs do not have an independent cause of action under § 301 of the Labor Management Relations Act because ERISA controls.

In addition to seeking summary judgment, the defendants argue that, pursuant to 29 U.S.C. § 1132, the plaintiffs are not entitled to punitive damages or other extra-contractual remedies, and that there is no right to a jury on the plaintiffs' claims so the jury demand must be stricken.

II. DISCUSSION

A. Standard For Summary Judgment

The purpose of summary judgment is to avoid a pointless trial in cases where it is unnecessary and would only cause delay and expense. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). When considering a motion for summary judgment, this Court shall grant such motion "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, this Court will resolve all reasonable doubts and inferences in favor of the nonmoving party. *Arnold Pontiac—GMC. Inc. v. General Motors Corp.*, 700 F. Supp. 838, 840 (W.D. Pa. 1988).

The inquiry into whether a "genuine issue" of material fact exists has been defined by the Supreme Court as whether "the evidence is such that a reasonable jury could return a

verdict for the nonmoving party." *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 248 (1986). "As to materiality, the substantive law will identify which facts are material." Id.

The Supreme Court articulated the allocation of burdens between a moving and nonmoving party in a motion for summary judgment in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The Court held that the movant had the initial burden of showing the absence of a genuine issue of material fact, but that this did not require the movant to support the motion with affidavits or other materials that negated the opponent's claim. *Id.* at 323. The Court also held that Rule 56(e) requires the nonmoving party to "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions, on file,' designate 'specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)).

The Supreme court further elaborated on the type of evidence that the nonmoving party is required to adduce in order to withstand a motion for summary judgment:

> We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred [a genuine issue of material fact.

Id.

B. "Adequate Information" And Control Claim

The Employee Retirement Income Security Act (ERISA) requires that employees receive a description and summary description of any employee benefit plan. 29 U.S.C.§ 1022. The summary plan description must include certain basic

information that "shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." *Id.* § 1022 (a)(1). The description is meant to cover all aspects of the plan in a concise and simple manner. "Summary plan descriptions ... should focus ... upon describing general rules in a way that allows the ordinary employee to understand when and where opportunity beckons and danger lurks." *Stahl v. Tony's Bldg. Materials, Inc.*, 875 F.2d 1404, 1408-09 (9th Cir. 1989). "Summary plan descriptions must warn employees of adversity." *Alexander v. Primerica Holdings Inc.*, 967 F.2d 90, 94 (3d Cir. 1992). A summary plan description cannot be expected to cover the precise situation of every particular beneficiary.

> The description, instead, should provide information about the general circumstances in which benefits could be lost.... It need not discuss every imaginable situation in which such events or actions might occur, but it must be specific enough to enable the ordinary employee to sense when there is a danger that benefits could be lost or diminished.

Stahl, 875 F.2d at 1408.

The description must strike a balance between sufficient specificity to warn the employees of any risks and generality to convey the overall plan. "(A) vague or blanket (boilerplate) disclaimer which merely warns the reader that the investment has risks will ordinarily be inadequate to prevent misinformation. To suffice, the cautionary statements must be substantive and tailored to the specific [plan]." *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 371-72 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1219 (1994); *see id.* at 372 (finding the language sufficient because "not only does the prospectus generally convey the riskiness of the investment, but its warnings and cautionary language directly address the substance of the statements the plaintiffs challenge").

In addition, ERISA § 404(c) provides that where a participant controls the assets, the fiduciary is not liable for losses

which result from exercise of that control. 29 U.S.C. § 1104(c). Recognizing the individualized nature of the participants' relationship to such assets, ERISA permits a finding of fiduciary breach only where a participant has somehow been denied "control" of his or her account. Lack of information may be one way of denying control.

In regard to information and control, the defendants claim they are entitled to summary judgment because the summary plan description and subsequent prospectuses provided the specific warnings required by ERISA and case law to allow the participants to exercise control over their investments and that plaintiffs at all times retained control over their individual investments. The plaintiffs, however, argue that the defendants' letters and prospectuses to employees contained no specific reference to Executive Life, and that the risk disclaimer did not appear until a few years after employees had begun investing in the plan. Moreover, the plaintiffs argue that failure to alert employees to the riskiness of junk bonds renders any disclaimers ineffective. Finally, the plaintiffs argue that participants did not really have control over the assets.

Unisys provided the required information and warnings. For example, the 1988 prospectus informed participants of the risks associated with their election to invest in GICs: "The Company [Unisys] does not guarantee the repayment of principal or interest." Each prospectus and SPD contained a similar warning to participants that there were no guarantees on their investments.

Participants had control over their assets, and exercised it based on the adequate information. For example, consistent with ERISA § 404(c), the plans gave participants the option to invest their contributions in one or more of six funds. The SPD explained, "[y]ou direct how your before-tax contributions are invested." Indeed, the plan itself was entirely voluntary, provided to the participants as a service.

Accordingly, summary judgment on Count I is appropriate.

C. Fiduciary Duty Claim

"Section 404(a) is the touchstone for understanding the scope and object of an ERISA fiduciary's duties." *Bixler v. Central Pa. Teamsters Health-Welfare Fund,* 12 F.3d 1292, 1298 (3d Cir. 1993); 29 U.S.C. § 1104. Under § 404(a)(1)(B), the fiduciary is held to the "experienced prudent person" standard. The regulations explain that a fiduciary satisfies the prudence standard with respect to an investment decision if the fiduciary "[h]as given appropriate consideration to those facts and circumstances that . . . the fiduciary knows or should know are relevant to the particular investment or investment course of action involved." 29 C.F.R. § 2550.404a-1(b) (1992). An ERISA fiduciary's duty is based on trust law and "it is black-letter trust law that fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits." *Bixler*, 12 F.3d at 1298 (quoting *Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 152-53 (1985)). "The duty to disclose material information is the core of a fiduciary's responsibility." *Id.* at 1300. However, "[a] significant exception to the rules governing fiduciaries applies to individual account plans that permit participants or beneficiaries to exercise control over assets in their account." ABA Section of Labor & Employment Law, *Employee Benefits Law* 293 (Steven J. Sacher et al., eds. 1991).

Here, Unisys met the requirements of the "experienced prudent person." The Company based its decision to invest in Executive Life on solid, respectable and typical grounds. Unisys examined the financial statements of Executive Life, all of which indicated that it was sound. It sought the opinion of an expert, who advised that Executive Life was a good investment. Most significantly, Unisys relied on the ratings of Standard & Poors and Moody's, both of which gave Executive Life high ratings of A+ or AAA. Finally, in 1990, when Unisys first sensed that Executive Life might have some problems, it explored its options and notified participants. With all of the information available to it at the time, Unisys clearly made prudent business and investment decisions. Plaintiffs cannot now use 20/20 hindsight to impose liability on Unisys.

Accordingly, summary judgment on Count II is appropriate.

D. The Labor Management Relations Act Claim

Defendants urge this Court to dismiss Count III of the complaint, alleging that the Union plaintiffs do not have an independent cause of action under § 301 of the Labor Management Relations Act. The defendants argue that Count III, like Counts I and II, goes only to the administration of the plan and not to the breach of a contract between employer and union, and ERISA, therefore, is the only appropriate governing statute.

Plaintiffs argue that the RIP was the product of collective bargaining and was not an employee benefit plan unilaterally established by the company. Therefore, as a negotiated contract, it is subject to § 301.

Section 301 governs "suits for violation of contracts between an employer and a labor organization." 29 U.S.C. § 185(a). "Although section 301 refers only to suits between employers and unions, and does not explicitly mention suits between employers and employees, the Supreme Court has read this provision to create federal jurisdiction over all claims that are substantially dependent upon analysis of a collective bargaining agreement." *Angst v. Mack Trucks. Inc.,* 969 F.2d 1530 (3d Cir. 1992); *Sprinkler Fitters Local 692 v. First Indemnity Ins. Co.,* 840 F. Supp. 38, 40 (E.D. Pa. 1993). "Collective bargaining agreements can establish a contractual obligation to provide pension benefits . . . . ERISA contains no restriction on the employees' rights to receive benefits not guaranteed under ERISA." *Pension Benefits Guaranty Corp. v. LTV Corp.,* 875 F.2d 1008, 1017 (2d Cir. 1989), *rev'd on other arounds,* 496 U.S. 633 (1990). "[N]othing in ERISA, nor in its legislative history, nor in the views expressed by the government corporation charged with administering ERISA-guaranteed pension' payments discountenances direct contractual recovery of pension benefits from the employer." *Murphy v. Hennenstall Co.,* 635 F.2d 233 (3d Cir.), *cert. denied,* 454 U.S. 1142 (1980).

The issue, therefore, is whether a contract existed between the Union Plaintiffs and the Defendants, other than the ERISA-guaranteed benefits. The parties' voluminous briefs and supplements attest to the fact that there is genuine disagreement as to this material issue. Summary judgment is therefore inappropriate on Count III.

E. Strike Jury Demand

Defendants also move to strike plaintiffs' demand for a jury trial. On Counts I and II of the complaint, the ERISA counts, a jury trial is not available because the relief sought is equitable only. *Turner v. CF & I Steel Corp.*, 770 F.2d 43, 46-47 (3d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *Nedd v. United Mine Workers of America*, 556 F.2d 190, 206-07 (3d Cir. 1977). However, "a claim under Section 301 that the employer breached a collective Bargaining Agreement 'is comparable to a breach of contract claim—a legal issue.' " *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806, 813 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2992 (1993). The *Senn* court held:

> Because the plaintiffs instituted a legal claim for breach of contract and sought legal relief in the form of compensatory damages pursuant to Section 301 of the LMRA, in addition to injunctive relief pursuant to sections 404 (a)(1), 502(a)(l)(B) and 302(a)(3) of ERISA, the Seventh Amendment provided" them with a right to a jury trial. Thus, the trial court acted properly in ordering a jury trial on the issue of whether the defendants breached the CBA in violation of section 301(a) of the Labor Management Relations Act and Sections 502(a)(1) and (a)(3) of ERISA.

Id. at 814.

Similarly, plaintiffs here have alleged a breach of the CBA by defendants. That legal claim, unlike the ERISA equitable claims, entitles them to a jury trial.

III. CONCLUSION

For all of the foregoing reasons, defendants' motion for summary judgment is granted as to Counts I and II. Defendants' motion for summary judgment on Count III and to strike the demand for a jury trial is denied.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE UNISYS SAVINGS PLAN LITIGATION	:	MASTER FILE
THIS DOCUMENT RELATES TO ALL ACTIONS	:	NO. 91-3067

ORDER

AND NOW, this 25th day of January, 1995, upon consideration of Defendants' Motion for Summary Judgment and to Strike Jury Demand, Plaintiffs' Opposition to Defendants' Motion, and Union Plaintiffs' Opposition to Defendants' Motion, IT IS HEREBY ORDERED that Defendants' Motion is **GRANTED** in part and **DENIED** in part.

IT IS FURTHER ORDERED that **JUDGMENT** is entered **IN FAVOR** of Defendants and **AGAINST** Plaintiffs on Counts I and II.

BY THE COURT:

/s/
HERBERT J. HUTTON, J.

Entered: 1/26/95
Clerk of Court

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-1156, 95-1157 and 95-1186

IN RE: UNISYS SAVINGS PLAN LITIGATION

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge,*
BECKER, MANSMANN, GREENBERG, SCIRICA,
COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE
and SAROKIN,
Circuit Judges.

The petition for rehearing filed by appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

Feb. 6, 1996

APPENDIX D

RELEVANT STATUTORY PROVISIONS

ERISA Sections 404(a), (c) and 409:

Act. Sec. 404(a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employee securities (as defined in section 407(d)(4) and (5)).

Act. Sec. 404.(b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

Act. Sec. 404. (c) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercise control over the assets in his account (as determined under regulations of the Secretary) —

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

Act. Sec. 409. (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

Act. Sec. 409. (b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

(2)

No. 95-1808

Supreme Court, U.S.
FILED
JUN 3 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

UNISYS CORPORATION, *et al.*,

Petitioners,

v.

JOHN P. MEINHARDT, for himself and all others similarly situated, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JAMES R. MALONE, JR.*
MICHAEL D. GOTTSCH
CHIMICLES, JACOBSEN & TIKELLIS
361 West Lancaster Avenue
Haverford, PA 19041
(610) 642-8500

JOEL C. MEREDITH
DANIEL B. ALLANOFF
MEREDITH COHEN & GREENFOGEL, P.C.
Architects Building
117 S. 17th Street
22nd Floor
Philadelphia, PA 19103
(215) 564-5182

RICHARD A. LOCKRIDGE
SARA MADSEN
SCHATZ PAQUIN LOCKRIDGE GRINDAL & HOLSTEIN P.L.L.P.
100 Washington Avenue, South
Suite 2200
Minneapolis, MN 55401
(612) 339-6900

**Respondents' Counsel of Record*

Attorneys for Respondents

Dated: June 3, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

36pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should this Court issue a writ of certiorari to determine whether review of the prudence of investment decisions by pension plan fiduciaries should be subject to the arbitrary and capricious standard, in the absence of any conflicting authority?

2. Should this Court issue a writ of certiorari to determine whether voluntary disclosures made by pension plan fiduciaries were materially misleading because they selectively included public information and excluded both public and non-public information, in the absence of any conflicting authority?

3. Should this Court issue a writ of certiorari to determine the scope of the prudence and disclosure obligations of pension plan fiduciaries prior to the entry of final judgment, where further proceedings in the action may alter the nature of the issues?

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RESPONDENTS' BRIEF IN OPPOSITION

John M. Meinhardt, Michael Heck, Joseph McCarthy, Angelo R. DiPietro, Gary Vala, Carolyn Gohlike, Dennis C. Stanga, James M. Collins, John H. Burgess, Jr., Bernard McDevitt, Parker Kean, Nadia F. Sos, Farouk M. Sos, Kenneth Goers, John J. Cieslicki, William Torkildson, Henry Zylla, Richard Silver, Ronald Grippo, Edward Lawler, Richard Andujar, Clarence Muller, Charles Wahler, James R. McLaughlin, Donald Rader, Joseph Lau, James Gangale, Alfred Contarino, Richard Colby, John Marcucci, Joseph A. Fiore, Richard Mastrodomenico, Nick Klemenz and Peter Szczybeck respectfully request that the Court deny the Petition for a of Writ of Certiorari seeking review of the Third Circuit's Opinion in this case. The Opinion is reported at 74 F.3d 420 (CA3 1996), and is reproduced in Petitioner's Appendix, Pet. App. at 1a-53a.

COUNTERSTATEMENT OF THE CASE

Petitioners (collectively, "Unisys") seek review of a decision vacating the entry of summary judgment in their favor; the facts surrounding this matter were developed at length in the opinion of the Third Circuit, which Respondents (the "Participants") incorporate by reference. *See In re Unisys Savings Plan Litig.*, 74 F.3d 420, 425-32 (CA3 1996) (Pet. App. 9a-22a).

Pursuant to Rule 15.2, the Participants wish to correct a misstatement of fact: Unisys states that it is not disputed that the participants will have recouped approximately eight-five percent of their Executive Life investments. (Petition at 4). The record is to the contrary.

Unisys conceded before the district court that the financial statements for the relevant pension plans included a seventy-three million dollar loss, approximately forty-one percent of the amount outstanding at the time Executive Life became insolvent. The loss was recognized because there was no assurance of any additional recovery from the liquidation of Executive Life. Moreover, Unisys ignores the loss of interest income suffered while the Participants' funds were frozen due to Executive Life's insolvency.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT EXERCISE JURISDICTION TO CONSIDER THE STANDARD OF REVIEW FOR BREACH OF FIDUCIARY DUTY CLAIMS IN THE ABSENCE OF CONFLICTING AUTHORITY

A. The Decision Below Does Not Conflict With A Decision Of This Court

Unisys asserts that the Third Circuit's decision raises the issue "left open" in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and that it conflicts with *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996), which purportedly supplied the answer to that "open" issue. (Petition at 6-8). Neither case is inconsistent with the decision below.

In *Firestone*, this Court held that, under an ERISA plan, a *de novo* standard of review should be applied in a challenge to denial of benefits unless the plan expressly grants the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe its terms, in which case an arbitrary and capricious

standard could apply. 489 U.S. at 115. This Court expressly limited its holding to the standard of review in challenges to a denial of benefits: "We express no view as to the appropriate standard of review for actions under other remedial provisions of ERISA." 489 U.S. at 108. This language does not suggest that any question exists concerning the standard of review applicable to claims for breach of fiduciary duty under ERISA. Indeed, as this Court emphasized, the "*wholesale* importation of the arbitrary and capricious standard into ERISA is unwarranted." 489 U.S. at 109 (emphasis in original).

The text of ERISA supports the conclusion that the potential applicability of an arbitrary and capricious standard should be restricted to claims relating to the determination of benefits. The statute includes a provision which delegates the initial responsibility for reviewing the denial of claims to plan fiduciaries. *See* 29 U.S.C. § 1133. In contrast, Congress committed the initial review of fiduciary decisions directly to the courts. *See* 29 U.S.C. § 1132(a)(2), (3). The decision of Congress to commit these claims to the judiciary indicates that it would be inappropriate to apply a deferential standard. *Cf. Adams Fruit Co. Inc. v. Barrett*, 494 U.S. 638, 649 (1990) (deference to an administrative agency is not appropriate where Congress established the judiciary and not the agency as the adjudicator of rights under a statute).

The common law of trusts also supports the conclusion that the potential applicability of an arbitrary and capricious standard should be restricted to benefit claims. Even where a trustee is given discretion, "the Court will interpose if the trustee in administering the trust fails to exercise proper care and skill." *See* Restatement (Second)

of Trusts § 187, comment i. At common law, the investment decisions of trustees were subject to the prudent person rule. *See* Restatement (Second) of Trusts § 227. This is the standard the Third Circuit applied. *See* 74 F.3d at 434 (Pet. App. 25a-26a).

Moreover, the applicability of an arbitrary and capricious standard under *Firestone* is not squarely presented here, since Unisys never placed the actual plan in the record. *See* 74 F.3d at 447 (Pet. App. 51a). This omission is fatal in light of *Firestone*'s holding that an arbitrary and capricious standard may only apply where supported by the text of a controlling plan document.[1] *See Firestone*, 489 U.S. at 111.

Similarly, the decision in *Varity Corp. v. Howe* does not support Unisys' petition. *Varity* did not concern the standard of review applicable to claims for breach of fiduciary duty under ERISA, and this Court's opinion did not address claims that a plan fiduciary breached the duty of prudence. The passage which Unisys has invoked

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[1] In addition, the argument that an arbitrary and capricious standard under *Firestone* should be applied in this case has been waived. The first time Unisys asserted this was at argument in the Court of Appeals, and the issue was not briefed until the petition for rehearing. Under the circumstances, although this Court is not barred from considering the issue, *see City of Houston v. Hill*, 428 U.S. 451, 467 n.16 (1987), it should decline to do so in accordance with its normal practice. *See City of Canton v. Harris*, 489 U.S. 378, 386 n.5 (1989) (refusing to address argument first raised on petition for rehearing); *EEOC v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (refusing to address argument first raised on petition for rehearing).

simply explains that allowing beneficiaries to sue individually under Section 502(a)(3) would not enable "lawyers [to] complicate ordinary benefit claims by dressing them up in 'fiduciary duty' clothing," since *Firestone* would still govern benefit claims regardless of how they are denominated. 116 S. Ct. at 1078-79.

B. The Decision Below Does Not Conflict With Decisions of Courts of Appeals Applying A Deferential Standard of Review

Unisys also attempts to craft a conflict between the Third Circuit's decision in this case and the decision of the First Circuit in *Mahoney v. Board of Trustees*, 973 F.2d 968 (CA1 1992), and purports to support the alleged conflict with *John Blair Communications, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan*, 26 F.3d 360 (CA2 1994), and *Moench v. Robertson*, 62 F.3d 553 (CA3 1995), *cert. denied*, 116 S. Ct. 917 (1996). These cases do not conflict with the decision below.

In *Mahoney*, retired longshoremen challenged a decision by plan trustees to increase disproportionately the pensions of longshoremen who were currently working, as opposed to those who were retired. 973 F.2d at 969. The First Circuit applied the "arbitrary and capricious" standard because the trustees had been explicitly granted discretion to benefit one group of beneficiaries over another; it distinguished cases that applied a stricter review because they did not involve the discretionary task of balancing the interests of competing beneficiaries. 973 F.2d at 971.

This case does not involve any balancing of the interests of competing groups of beneficiaries; none of the plan's investors benefited from Unisys' failure to investigate prior to investing. Conversely, *Mahoney* did not involve a challenge to the investment of plan assets. The two cases present no analogy and no inconsistency.

In *John Blair*, the Second Circuit rejected the argument that the *Firestone* arbitrary and capricious standard should apply to claims for breach of fiduciary duty. Like the First Circuit in *Mahoney*, the *John Blair* Court distinguished between claims challenging the trustee's decision to sacrifice beneficiary interests in favor of third parties and claims challenging the trustee's efforts to balance the interests of competing groups of beneficiaries. 26 F.3d at 369. Although *John Blair* did not involve a challenge to fiduciary investment decisions, the Second Circuit's decision to apply *de novo* review is not in conflict with the approach which the Third Circuit followed.

Unisys also incorrectly asserts that the Third Circuit's decision below conflicts with the prior decision of another panel of that Court in *Moench v. Robertson*. Of course, even if the two decisions were truly in conflict, that would not supply a sufficient basis for an exercise of this Court's certiorari jurisdiction.[2] *See Davis v. United States*, 417 U.S. 333, 340 (1974).

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[2] The Third Circuit's Internal Operating Procedures provide that a prior reported opinion is binding upon subsequent panels. 3d Cir. I.O.P. 9.1. It is noteworthy that the author of the opinion in *Unisys* sat on the *Moench* panel, that *Moench* was submitted by Unisys under Rule 28(j) of the Federal Rules of Appellate Procedure and discussed at argument, and that *Moench* served as part of the predicate for Unisys' petition

While the Third Circuit adopted an abuse of discretion standard for reviewing certain investment decisions in *Moench*, it did so in the unique circumstances of an employee stock ownership plan. Given the special nature of these types of plans, the Third Circuit concluded that the failure to apply a deferential standard to decisions to invest in employer securities would potentially read the specific exemption from diversification requirements applicable to these plans out of the statute and would potentially convert employee stock ownership plans into ordinary pension plans, frustrating a legislative intent to encourage employee ownership. 62 F.3d at 570-71. Thus, the *Moench* Court's application of a deferential standard of review was expressly limited to the unique circumstances of an employee stock ownership plan. None of these circumstances are presented here, and there is no conflict between *Moench* and the decision below.

C. The Decision Below Does Not Conflict With Decisions Of Courts of Appeals Requiring a Plaintiff to Demonstrate a Causal Nexus Between a Breach of Duty and a Loss

Unisys also asserts that the decision below "conflicts with those courts of appeals decisions holding that ERISA's causation requirement . . . compels application of a deferential standard of review to challenges to fiduciary investment decisions." (Petition at 10). Unisys cites two

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for rehearing and suggestion for rehearing *en banc*. Plainly, in denying the petition for rehearing, the Third Circuit was of the view that there was no inconsistency between its holding in *Moench* and its holding here.

cases to support this claimed conflict, *Fink v. National Savings and Trust Co.*, 772 F.2d 951 (CADC 1985), and *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915 (CA8 1994). These cases actually were relied upon by the Third Circuit in the decision below. *See* 74 F.3d at 434 (Pet. App. 26a).

As both *Fink* and *Roth* hold, prudence under ERISA is measured according to the statutory standard derived from the common law of trusts, a standard which is applied objectively. *See Fink*, 772 F.2d at 955; *Roth*, 16 F.3d at 917. Unisys relies upon language from Justice Scalia's dissent in *Fink* indicating that he was unaware of any case in which a trustee who happened to make objectively prudent investments had been held liable for losses due to a failure to investigate and evaluate beforehand. 772 F.2d at 962 (Scalia, J., concurring in part and dissenting in part). This approach merely imposes a causation requirement before a fiduciary will be held liable for losses sustained by a plan. *See id.* If a thorough investigation would not have turned up any adverse information, then any subsequent loss would not have been the result of the failure to investigate. Here, the Third Circuit analyzed the record and determined that material evidence of causation existed, pointing to a variety of adverse information that a prudent investigation would have revealed. 74 F.3d at 436 (Pet. App. 29a).

Roth is consistent with this approach of testing the causal link between an alleged loss and a breach of the duty to investigate. *See* 16 F.3d at 919. Thus, neither *Fink* nor *Roth* is in conflict with the decision below.

D. Unisys' "Objective Evidence" Argument Misstates the Law

Lacking a conflicting decision from this Court or a Court of Appeals, Unisys argues that "an abundance of objective evidence" supported the investment decisions since Executive Life was licensed to do business and had received high ratings from two rating services.[3] To support this argument, Unisys cites regulations on the termination of single-employer pension plans and the definition of an "employee benefit plan" under ERISA. *See* 29 C.F.R. §§ 2510.3-3(a), 2617.1 (Resp. App. 8a, 11a). This argument misstates the law, as these regulations do not govern fiduciary investment decisions.

The specific provisions upon which Unisys relies merely set forth the required contents of a termination notice and define when an individual is not a participant covered under an employee pension plan. *See* 29 C.F.R. §§ 2510.3-3(d)(2)(ii)(A)(1), 2617.22(d)(8) (Resp. App. 9a, 12a). These provisions establish minimum requirements, but they do not exempt fiduciaries from the application of the prudent person standard of ERISA Section 404(a). For example, high ratings from certain rating services do not furnish objective evidence of prudence. *See* 29 C.F.R. § 2509.95-1(c) (Resp. App. 7a-8a). *See also Pilkington PLC v. Perelman*, 72 F.3d 1396, 1401 (CA9 1995). Since reliance upon ratings alone does not meet fiduciary standards, the mere fact that Executive Life was licensed to do business

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[3] Unisys omits the fact that a third rating service had issued a distinctly lower rating and that it had other information which raised serious questions about the validity of the two high ratings. 74 F.3d at 427, 436 (Pet. App. 12a, 29a-30a).

does not establish that Unisys' investment decisions were prudent as a matter of law.

II. THIS COURT SHOULD NOT EXERCISE JURISDICTION TO CONSIDER THE DISCLOSURE OBLIGATIONS OF PLAN FIDUCIARIES IN THE ABSENCE OF CONFLICTING AUTHORITY

A. The Decision Below Does Not Conflict With Relevant Regulatory Authority

Unisys asserts that the Third Circuit's holding on its disclosure obligations imposes burdens that conflict with regulations issued by the Department of Labor; this assertion does not create a reasoned basis for the exercise of this Court's jurisdiction.

The issue Unisys seeks to create rests upon a twofold misstatement of the Third Circuit's holding: Unisys contends that the decision imposes upon it a duty to gather public data and to transmit that data on an ongoing basis. The Third Circuit's holding is far more limited: the duty of disclosure only embraces "material information of which [Unisys] had knowledge"[4] and is expressly limited to the situation in which a fiduciary elects to make a disclosure.[5] On the basis of its mischaracterizations of the Third Circuit's holding, Unisys asserts that

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[4] *See Unisys*, 74 F.3d at 443 (Pet. App. 43a).

[5] *See Unisys*, 74 F.3d at 442-43 ("It is important to note what we have not decided. As the uncontroverted record reveals that Unisys elected and indeed intended to communicate with participants . . . we have not determined whether Unisys had a duty under Section 1104(a) to communicate anything at all . . . in the first place."). (Pet. App. 43a).

the decision below conflicts with regulations issued by the Department of Labor under Section 404(c) of ERISA, regulations which it contends limit disclosure duties to non-public information. Unisys' discussion of the regulations issued under Section 404(c) misstates the law.[6]

The regulations at issue govern the availability of an exemption from liability for fiduciaries of certain individual account plans where a plan participant's losses are caused by his exercise of control over the assets in his account. *See* 29 U.S.C. § 1104(c). Unisys relies upon a segment of these regulations that provides as follows:

> (2) *Independent Control.* Whether a participant or beneficiary has exercised independent control in fact with respect to a transaction depends on the facts and circumstances of the particular case. However, a participant's or beneficiary's exercise of control is not independent in fact if:
>
> . . .
>
> (ii) A plan fiduciary has concealed material non-public facts regarding the investment from the participant or beneficiary, unless the disclosure of such information by the plan fiduciary to the participant or beneficiary would

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[6] This argument also ignores the record in two significant respects. First, Unisys ignores the existence of material issues on whether the plans fall within the scope of Section 404(c). *See* 74 F.3d at 446-48 (Pet. App. 49a-52a). Second, Unisys ignores the fact that the information withheld from the Participants included non-public information, such as the default risk which Executive Life revealed during a private meeting with Unisys. 74 F.3d at 429 (Pet. App. 15a).

> violate any provision of federal law or any provision of state law which is not preempted by [ERISA].

29 C.F.R. § 2550.404c-1(c)(2)(ii) (Resp. App. 10a).

This provision does not excuse a fiduciary from furnishing public data. Instead, it imposes a disclosure duty upon fiduciaries seeking relief from potential liability, mandating that they disclose material non-public information. This section also implies that a broader disclosure obligation may exist in a particular case by indicating that the question whether a participant has exercised independent control turns on the facts of each case. In fact, a parallel provision of the same regulation specifically imposes an affirmative duty to disclose public information to participants in the form of the most recent prospectus for investments subject to the Securities Act of 1933. *See* 29 C.F.R. § 2550.404c-1(b)(2)(B)(1)(viii) (Resp. App. 10a).

There is no conflict between the disclosure duties recognized by the Third Circuit and the regulations issued by the Department of Labor under Section 404(c) of ERISA.

B. The Decision Below Is Consistent With Precedent Developed in the Area of Securities Regulation

Unisys attempts to portray the Third Circuit's analysis of disclosure duties as a deviation from precedents in the securities area, but the effort is unavailing. Unisys commences with the premise that its disclosures could

not be considered misleading if countervailing information was available somewhere else. This assumption is at odds with settled precedent recognizing that where truthful information has been conveyed, liability may still attach if the manner in which the information was disclosed in terms of its prominence and emphasis rendered the overall disclosure misleading.[7] In *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), this Court rejected the simplistic analysis that Unisys offers here, reasoning as follows:

> [N]ot every mixture with the true will neutralize the deceptive. If it would take a financial analyst to spot the tension between the one and the other, whatever is misleading will remain materially so, and liability should follow.

501 U.S. at 1097 (citations omitted).

Moreover, the contention that public information is never required to be disclosed under the securities laws is not correct. Companies issuing securities in a public offering under the Securities Act of 1933 or filing reports under the Securities Exchange Act of 1934 must disclose a variety of publicly available information. *See* 17 C.F.R. §§ 229.101(c)(1), 229.103, 229.210(a), (c) (Resp. App. 4a-7a).

There are cases in which courts properly hold that the failure to disclose some item will not result in liability because the allegedly withheld information is widely available. This situation typically arises in fraud-on-the-

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[7] *See, e.g., Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 200-03 (CA5), *cert. denied*, 488 U.S. 926 (1988); *see also Greenapple v. Detroit Edison Co.*, 618 F.2d 198, 205, 210 (CA2 1980).

market cases, where liability will not attach to a materially misleading disclosure if the truth "credibly entered the market and dissipated the effects of the misstatements." *Basic, Inc. v. Levinson*, 485 U.S. 224, 249 (1988). In this narrowly circumscribed context, the failure to disclose may be cured by the availability of information elsewhere because these cases rest on the hypothesis that in "an open and developed market," stock prices reflect all available information. *See Basic*, 485 U.S. at 241 (*quoting Peil v. Speiser*, 806 F.2d 1154, 1160-61 (CA3 1986)). Even applying *Basic*, courts require a showing that the undisclosed information entered the market place "with a degree of intensity and credibility sufficient to effectively counter-balance any misleading impression created by the insiders' one-sided representations." *See In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1116 (CA9 1989), *cert. denied*, 496 U.S. 943 (1990). Here, *Basic* and *Apple* have no application because neither the Insurance Contract Fund nor the Fixed Income Fund traded in an open, developed and efficient market. In fact, these two funds did not trade, and individual account balances did not fluctuate in response to adverse news concerning Executive Life.

III. THIS COURT SHOULD NOT EXERCISE JURISDICTION BECAUSE THE ISSUES RAISED IN THE PETITION ARE NOT RIPE FOR DETERMINATION

The procedural posture of this case makes it inappropriate for review by this Court. After vacating the district court's grant of summary judgment, the Third Circuit remanded the matter for further proceedings consistent with its decision. 74 F.3d at 448 (Pet. App. 53a).

In *Virginia Military Institute v. United States*, 113 S. Ct. 2431 (1993), this Court denied a petition for a writ of certiorari where the Fourth Circuit had remanded the case to the district court for further proceedings. *See United States v. Virginia*, 976 F.2d 890, 900 (CA4 1992), *cert. denied*, 113 S. Ct. 2431 (1993). The case involved significant constitutional issues under the fourteenth amendment, and the record had been developed with a six-day trial and detailed findings of fact. 976 F.2d at 892. The remand occurred solely to address the appropriate remedy. 976 F.2d at 900. The military college sought certiorari to review the adverse ruling made by the court of appeals. In commenting upon the Court's denial of a writ of certiorari, Justice Scalia repeated the principle that "[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction." 113 S. Ct. at 2432 (Scalia, J., concurring).

In contrast to *Virginia Military Institute*, this case presents neither a fully developed factual record nor an important constitutional issue that should warrant the Court's immediate attention. Indeed, the Third Circuit catalogued a long list of genuine issues of material fact precluding summary judgment and remanded the case to the district court for further proceedings. As such, the issues in this case simply "are not yet ripe for review." *See Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostok R.R. Co.*, 389 U.S. 327, 328 (1967) (*per curiam*).

The fact-specific nature of the asserted issues also indicates that this case is not appropriate for review. The Third Circuit's decision rested on the existence of disputed material facts on the Participants' claims that

Unisys violated its duties of prudence and disclosure. 74 F.3d at 437, 443 (Pet. App. 32a, 43a). This Court has long avoided such factual disputes: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J., concurring); *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981); *Rudolph v. United States*, 370 U.S. 269, 270 (1962) (per curiam).

As the Court held long ago in *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916):

> [Certiorari] is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. *And except in extraordinary cases, the writ is not issued until final decree.* The decree that was sought to be reviewed by certiorari at complainant's instance *was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application.*

Id. at 258 (emphasis added) (citations omitted). Here, Unisys has not presented an "extraordinary case" that would merit the exercise of jurisdiction, and, as such, its request for review is premature and should await final judgment in the case.

CONCLUSION

In light of the foregoing arguments, the petition for a writ of certiorari should be denied.

Dated: June 3, 1996

Respectfully submitted,

CHIMICLES, JACOBSEN & TIKELLIS
JAMES R. MALONE, JR.*
MICHAEL D. GOTTSCH
361 West Lancaster Avenue
Haverford, PA 19041
(610) 642-8500

MEREDITH COHEN &
GREENFOGEL, P.C.
JOEL C. MEREDITH
DANIEL B. ALLANOFF
Architects Building
117 S. 17th Street
22nd Floor
Philadelphia, PA 19103
(215) 564-5182

SCHATZ PAQUIN LOCKRIDGE GRINDAL
& HOLSTEIN P.L.L.P.
RICHARD A. LOCKRIDGE
SARA MADSEN
100 Washington Avenue, South
Suite 2200
Minneapolis, MN 55401
(612) 339-6900

*Respondents' Counsel of Record
Attorneys for Respondents

APPENDIX

STATUTES

29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

* * *

(c) Control over assets by participant or beneficiary

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) –

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

29 U.S.C. § 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. § 1132. Civil enforcement

(a) Persons empowered to bring a civil action.

A civil action may be brought –

* * *

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * *

29 U.S.C. § 1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall –

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

REGULATIONS OF THE U.S. SECURITIES & EXCHANGE COMMISSION

17 C.F.R. § 229.101 (Item 101) Description of business.

* * *

(c) *Narrative description of business.*

(1) Describe the business done and intended to be done by the registrant and its subsidiaries, focusing upon the registrant's dominant industry segment or each reportable industry segment about which financial information is presented in the financial statements. To the extent material to an understanding of the registrant's business taken as a whole, the description of each such segment shall include the information specified in paragraphs (c)(1) (i) through (x) of this section.

* * *

(iv) The importance to the industry segment and the duration and effect of all patents, trademarks, licenses, franchises and concessions held.

(v) The extent to which the business of the industry segment is or may be seasonal.

(vi) The practices of the registrant and the industry (respective industries) relating to working capital items (*e.g.*, where the registrant is required to carry significant amounts of inventory to meet rapid delivery requirements of customers or to assure itself of a continuous allotment of goods from suppliers; where the registrant provides rights to return merchandise; or where the registrant has provided extended payment terms to customers).

* * *

(x) Competitive conditions in the business involved including, where material, the identity of the particular markets in which the registrant competes, an estimate of the number of competitors and the registrant's competitive position, if known or reasonably available to the registrant.

* * *

17 C.F.R. § 229.103 (Item 103) Legal proceedings.

Describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. Include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought.

* * *

17 C.F.R. § 229.201 (Item 201) Market Price of and dividends on the registrant's common equity and related stockholder matters.

(a) *Market information.* (1)(i) Identify the principal United States market or markets in which each class of the registrant's common equity is being traded.

* * *

(ii) If the principal United States market for such common equity is an exchange, state the high and low sales prices for the equity for each full quarterly period

within the two most recent fiscal years and any subsequent interim period for which financial statements are included, or are required to be included by Article 3 of Regulation S-X [17 C.F.R. 210], as reported in the consolidated transaction reporting system or, if not so reported, as reported on the principal exchange market for such equity.

(iii) If the principal United States market for such common equity is not an exchange, state the range of high and low bid information for the equity for each full quarterly period within the two most recent fiscal years and any subsequent interim period for which financial statements are included, or are required to be included by Article 3 of Regulation S-X, as regularly quoted in the automated quotation system of a registered securities association, or where the equity is not quoted in such a system, the range of reported high and low bid quotations, indicating the source of such quotations.

* * *

(c) *Dividends.* (1) State the frequency and amount of any cash dividends declared on each class of its common equity by the registrant for the two most recent fiscal years and any subsequent interim period for which financial statements are required to be presented by § 210.3 of Regulation S-X.

* * *

REGULATIONS OF THE DEPARTMENT OF LABOR

29 C.F.R. § 2509.95-1 Interpretive Bulletin relating to the fiduciary standard under ERISA when selecting an annuity provider.

(a) Scope. This Interpretive Bulletin provides guidance concerning certain fiduciary standards under part 4 of title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1104-1114, applicable to the selection of annuity providers for the purpose of pension plan benefit distributions where the plan intends to transfer liability for benefits to the annuity provider.

* * *

(c) Selection of Annuity Providers. * * * In discharging their obligations under section 404(a)(1), 29 U.S.C. 1104(a)(1), to act solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to the participants and beneficiaries as well as defraying reasonable expenses of administering the plan, fiduciaries choosing an annuity provider for the purpose of making a benefit distribution must take steps calculated to obtain the safest annuity available, unless under the circumstances it would be in the interests of participants and beneficiaries to do otherwise. In addition, the fiduciary obligation of prudence, described at section 404(a)(1)(B), 29 U.S.C. 1104(a)(1)(B) requires, at a minimum, that plan fiduciaries conduct an objective, thorough and analytical search for the purpose of identifying and selecting providers from which to purchase annuities. In conducting such a search, a fiduciary must evaluate a number of factors relating to a potential annuity provider's claims paying ability and creditworthiness.

Reliance solely on ratings provided by insurance rating services would not be sufficient to meet this requirement. In this regard, the types of factors a fiduciary should consider would include, among other things:

(1) the quality and diversification of the annuity provider's investment portfolio;

(2) the size of the insurer relative to the proposed contract;

(3) the level of the insurer's capital and surplus;

(4) the lines of business of the annuity provider and other indications of an insurer's exposure to liability;

(5) the structure of the annuity contract and guarantees supporting the annuities, such as the use of separate accounts;

(6) the availability of additional protection through state guaranty associations and the extent of their guarantees. Unless they possess the necessary expertise to evaluate such factors, fiduciaries would need to obtain the advice of a qualified, independent expert. * * *

29 C.F.R. § 2510.3-3 Employee benefit plan.

(a) General. This section clarifies the definition in section 3(3) of the term "employee benefit plan" for purposes of title I of the Act and this chapter. It states a general principle which can be applied to a large class of plans to determine whether they constitute employee benefit plans within the meaning of section 3(3) of the Act. Under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3) are subject to title I.

* * *

(d) Participant covered under the plan.

* * *

(2)(ii) An individual is not a participant covered under an employee pension plan or a beneficiary receiving benefits under an employee pension plan if –

(A) The entire benefit rights of the individual –

(1) Are fully guaranteed by an insurance company, insurance service or insurance organization licensed to do business in a State, and are legally enforceable by the sole choice of the individual against the insurance company, insurance service or insurance organization * * *

29 C.F.R. § 2550.404c-1 ERISA section 404(c) plans.

* * *

(b)(2) Opportunity to exercise control. (i) a plan provides a participant or beneficiary an opportunity to exercise control over assets in his account only if:

* * *

(B) The participant or beneficiary is provided or has the opportunity to obtain sufficient information to make informed decisions with regard to investment alternatives available under the plan, and incidents of ownership appurtenant to such investments. For purposes of this subparagraph, a participant or beneficiary will not be considered to have sufficient investment information unless –

(1) The participant or beneficiary is provided by an identified plan fiduciary (or a person or persons designated by the plan fiduciary to act on his behalf):

* * *

(viii) In the case of an investment alternative which is subject to the Securities Act of 1933, and in which the participant or beneficiary has no assets invested, immediately following the participant's or beneficiary's initial investment, a copy of the most recent prospectus provided to the plan. This condition will be deemed satisfied if the participant or beneficiary has been provided with a copy of such most recent prospectus immediately prior to the participant's or beneficiary's initial investment in such alternative;

* * *

(c) Exercise of control.

* * *

(2) Independent control. Whether a participant or beneficiary has exercised independent control in fact with respect to a transaction depends on the facts and circumstances of the particular case. However, a participant's or beneficiary's exercise of control is not independent in fact if:

* * *

(ii) A plan fiduciary has concealed material nonpublic facts regarding the investment from the participant or beneficiary, unless the disclosure of such information by the plan fiduciary to the participant or beneficiary

would violate any provision of federal law or any provision of state law which is not preempted by the Act; * * *

29 C.F.R. § 2617.1 Purpose and scope.

(a) Purpose. This part sets forth the rules and procedures for terminating a single-employer pension plan in a standard termination under the Employee Retirement Income Security Act of 1974, as amended. * * *

29 C.F.R. § 2617.2 Definitions.

For purposes of this part:

* * *

Insurer means a company authorized to do business as an insurance carrier under the laws of a state or the District of Columbia.

* * *

29 C.F.R. § 2617.4 Administration of plan during pendency of termination proceedings.

* * *

(c) Exceptions. During the period set forth in paragraph (b) of this section, the plan administrator may pay benefits attributable to employer contributions either through the purchase of irrevocable commitments from an insurer or in a form other than an annuity * * *

29 C.F.R. § 2617.22 Notice of intent to terminate.

(a) General rule. At least 60 days and no more than 90 days before the proposed termination date, the plan administrator shall issue to each person who is (as of the proposed termination date) an affected party a written

notice of intent to terminate containing all of the information specified in paragraph (d) of this section. * * *

(d) Contents of notice. The plan administrator shall include in the notice of intent to terminate all of the following information:

* * *

(8) A statement that, after plan assets have been distributed to provide all benefit liabilities with respect to a participant or a beneficiary of a deceased participant, either by the purchase of an irrevocable commitment or commitments from an insurer to provide benefits or by an alternative form of distribution provided for under the plan, the PBGC's guarantee with respect to that participant's or beneficiary's benefit ends; * * *

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

UNISYS CORPORATION, *et al.*,

Petitioners,

v.

JOHN P. MEINHARDT, for Himself and All Others Similarly Situated, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONERS

LAURENCE Z. SHIEKMAN
Counsel of Record
BRIAN T. ORTELERE
PEPPER, HAMILTON & SCHEETZ
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103-2799
(215) 981-4000

JOSEPH A. TEKLITS
UNISYS CORPORATION
P.O. Box 500 C2NW14
Blue Bell, PA 19424-0001

Attorneys for Petitioners

PACKARD PRESS® / APPELLATE DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

No. 95-1808

UNISYS CORPORATION, *et al.*,

Petitioners,

v.

JOHN P. MEINHARDT, for Himself and All Others Similarly Situated, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONERS

ARGUMENT

Respondents' argument that neither *Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101 (1989), nor *Varity Corp. v. Howe,* 116 S. Ct. 1065 (1996), conflicts with the Third Circuit's opinion in *In re Unisys Savings Plan Litig.,* 74 F.3d 420 (3d Cir. 1996), reflects a fundamental misunderstanding of the origins of the "arbitrary and capricious" standard, as applied in *Firestone* to ERISA benefits claims. In any event, this Court's recent opinion in *Varity* alone compels summary reversal of the Court of Appeals.

As *Firestone* makes certain, application of the deferential standard of review to fiduciary decisions affecting ERISA benefits claims derives not from the express language of the statute, as respondents seemingly argue. Rather, in concluding that judicial deference is warranted, the Court in *Firestone* examined both the texture of the statute, *e.g.*, "ERISA abounds with the language and terminology of trust law," *Firestone,* 489 U.S. at 110, and the congressional mandate in the accompanying legislative history. *Id.* ("ERISA's legislative history confirms that the Act's fiduciary responsibility provisions, 29 U.S.C. § 1101-1114, 'codif[y] and make applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.'").[1] The simple question posed in Unisys' Petition is whether the reasoning of *Firestone* should equally apply to the judicial resolution of fiduciary breach claims in general, and fiduciary investment choices in particular.

Although the *Firestone* Court reserved this issue for another day, the Court's reasoning in that opinion, and the authority there cited, compel the conclusion that deference is owed a fiduciary making investment choices as well. According to Justice O'Conner, "[t]rust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers." *Id* at 111.[2]

Given the breadth of the *Firestone* opinion, it is quite unremarkable that some lower courts, contrary to the Third Circuit in *Unisys,* have applied *Firestone* to fiduciary breach claims. In *Mahoney v. Board of Trustees,* 973 F.2d 968 (1st Cir. 1992), cited in Unisys' Petition, the First Circuit applied the

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1. *Quoting* H.R. Rep. No. 93-533, p. 11 (1973).

2. For that proposition, the Court in *Firestone* cited to section 187 of the *Restatement (Second) of Trusts. Firestone,* 489 U.S. at 111. As described in Unisys' Petition, the commentary to *Restatement* section 187 extends this discretionary authority to investment decisions. *See* Petition at 8 n.7. Nevertheless, respondents contend that Unisys waived this argument because the Plan is not available to this Court. To respond to that possible concern, Unisys today lodged the Plan with the Clerk of Court. That document, submitted to the Internal Revenue Service as part of the tax qualification process on September 15, 1989, amply demonstrates the discretion enjoyed by the Unisys fiduciaries to make investment choices. *See* Unisys Savings Plan at §§ 4(p), 39(b) and 42.

arbitrary and capricious standard to its review of a fiduciary breach claim, given the trustee's reservation of discretion in the governing plan document. Respondents unavailingly seek to distinguish *Mahoney* on the grounds that *Unisys* "does not involve any balancing of the interests of competing groups of beneficiaries." *See* Brief in Opp. at 6. This argument ignores the indisputable fact that fiduciaries' investment decisions necessarily reflect the balancing of myriad considerations (including the length of the investment and the risk versus the potential reward). In other words, the weighing of these competing and varied considerations, prior to the making of investment choices, is no less entitled to judicial deference than the challenged decision in *Mahoney.* The relevant *Restatement* authority, cited with approval in *Firestone,* compels this conclusion. *See supra* at 2 n.2.[3]

The point is made clear in the Third Circuit's opinion in *Moench v. Robertson,* 62 F.3d 553 (3d Cir. 1995), *cert. denied,* 116 S. Ct. 917 (1996). In sweeping language, the Third Circuit there held, contrary to its ruling in *Unisys,* that *Firestone* applies equally to judicial review of a fiduciary's investment decisions. *Moench,* 62 F.3d at 565. Nevertheless, respondents hope to distinguish *Moench* on the grounds that the decision applies only to employee stock ownership plans or "ESOPs." Respondents are wrong. First, the *Moench* court, citing *Firestone,* reached the unassailable conclusion that the deferential standard likely applies to the judicial review of *all* fiduciary breach claims. In other words, "trust law should guide the standard of review over claims, such as those here, not only under section 1132(a)(1)(B) but also over claims filed

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3. Stated differently, as this Court recognized the other day, the exercise of discretion is the hallmark of fiduciary activity under ERISA:

> As the Second Circuit has observed, "only when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management or administration," does a person become a fiduciary under [ERISA] § 3(21)(A).

Lockheed Corp. v. Spink, No. 95-809, 1995 U.S. LEXIS 3717, at * 14-15 (U.S. June 10, 1996)(quoting *Siskind v. Sperry Retirement Program, Unisys,* 47 F.3d 498, 505 (1995)).

pursuant to 29 U.S.C.A. § 1132(a)(2) based on violations of the fiduciary duties set forth in section 1104(a)." *Moench,* 62 F.3d at 565.

In any event, the ESOP in *Moench* and the 401(k) savings plan in *Unisys* are largely indistinguishable. As such, there is no principled basis to apply such a deferential standard to the facts in *Moench,* while employing strict scrutiny in *Unisys.* Both the *Unisys* plan and the *Moench* plan are voluntary; neither plan guaranteed a benefit at retirement; and plaintiffs in both suits sought, contrary to the congressional directive, to transform the plans' fiduciaries into the guarantors of the benefits provided under the plans. Read carefully, the plans in *Moench* and *Unisys* share many attributes; hence, the Third Circuit's refusal to apply a deferential standard to these facts evidences the uncertainty in the lower courts and further underscores the need for this Court's review of the *Unisys* opinion.

In stark contrast to *Mahoney* and *Moench,* and consistent with the Third Circuit's *Unisys* opinion, is the Second Circuit's ruling in *John Blair Communications, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan,* 26 F.3d 360 (2d Cir. 1994). Mindful of respondents' vigorous contention that *Firestone* is properly limited to ERISA benefits claims, the reasoning supporting the Second Circuit's refusal to extend the application of *Firestone* to fiduciary breach claims deserves closer scrutiny. According to that court, *Firestone* applies not to fiduciary breach litigation but only to a "*simple* denial of benefits, over which the plan administrators have discretion." 26 F.3d at 360 (emphasis added). To limit *Firestone's* reach to such "simple" claims ignores both the reality of benefits administration and the indisputable fact that plan documents typically grant fiduciaries discretion over investment decisions such as those at issue here.[4]

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4. The distinction drawn in *John Blair,* between the "simple" benefits claims (where judicial deference is appropriate), and the presumably more complex fiduciary breach claims, is untenable. Benefits claims cannot be so readily categorized as, in fact, such claims often present life and death issues for participants. For example, benefits claims resolved under the arbitrary and capricious standard include litigation brought to challenge plan admin-

In any event, this discussion of conflicting authority in the lower courts may be, at the end of the day, of historical significance only. Again, this Court's recent opinion in *Varity* holds, in no uncertain terms, that the arbitrary and capricious standard applies to fiduciary breach claims. Although the central ruling in *Varity* permits individual fiduciary breach claims under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), the Court went on to hold that fiduciaries need not fear an increase in fiduciary breach litigation (with the application of a more stringent standard of review). The arbitrary and capricious standard applies equally to the judicial review of claims raising fiduciary breach issues:

> After all, *Firestone,* which authorized deferential court review when the plan itself gives the administrator discretionary authority, based its decision upon the same common-law trust doctrines that govern standards of fiduciary conduct.

Varity, 116 S. Ct. at 1079. This Court should summarily reverse the Third Circuit on the authority of its intervening decision in *Varity.* If *Varity* does not supply the governing rule of law, this Court should grant Unisys' Petition to resolve this important issue which is the subject of conflicting appellate decisions.

In fact, the procedural posture of this dispute, considered in light of the legal argument Unisys presents, undermines respondents' contention that this Court's review should be deferred until conclusion of a trial on the merits. Application of the deferential standard required by *Firestone* and *Varity* to fiduciary breach litigation will increase the likelihood of summary judgment rulings in favor of fiduciaries (and would exonerate Unisys from these claims to damages without the need for trial). A trial of this matter would subject Unisys to many years of additional litigation (the cost of which *Varity*

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istrators' refusals to extend "experimental" cancer treatments to dying participants. *E.g., Clark v. K-Mart Corp.,* 979 F.2d 965 (3d Cir. 1992); *Holder v. Prudential Ins. Co.,* 951 F.2d 89 (5th Cir. 1992). The Court of Appeals' failure to apply the arbitrary and capricious standard to fiduciary breach claims cannot be justified on the grounds that such claims are somehow more important, and, as such, worthy of a more exacting form of judicial review.

and *Firestone* are calculated to avoid), while affording this Court no additional insights into the purely legal question on the governing scope of review. In sum, given the peculiar nature of the issues raised in Unisys' Petition regarding the appropriateness of applying a deferential standard of review, a standard especially well-suited for application in the summary judgment context, the matter should now be reviewed by this Court and not at the conclusion of a potentially irrelevant and costly trial.

Respectfully submitted,

LAURENCE Z. SHIEKMAN
Counsel of Record
BRIAN T. ORTELERE
PEPPER, HAMILTON & SCHEETZ
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103-2799
(215) 981-4000

JOSEPH A. TEKLITS
UNISYS CORPORATION
P.O. Box 500 C2NW14
Blue Bell, PA 19424-0001

Attorneys for Petitioners

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